



NAME, IMAGE, AND LIKENESS ("NIL") INSTITUTIONAL REPORT

OCTOBER-NOVEMBER 2021

"With NIL comes many new opportunities and challenges for college sports. The LEAD1 NIL Institutional Report helps our members navigate through these changes."

—Tom McMillen, President and Chief Executive Officer of LEAD1 Association

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The NIL Institutional Report

NIL

The Tom McMillen Federal NIL Scoop

By Tom McMillen, President and Chief Executive Officer of LEAD1. McMillen is a former Congressman, college basketball All-American, Rhodes Scholar, and NBA player, who took over LEAD1 in 2015.

Thank you for reading the third issue of the LEAD1 NIL Institutional Report.

Since our second issue released in late August, not much has changed on the federal NIL front, as there continues to be disagreement between Democrats and Republicans about the breadth of a potential congressional NIL bill. The House Energy and Commerce Committee recently held a hearing on the NIL issue, and it is still apparent that the Democrats want a broader bill with potential health and safety protections, scholarship guarantees, and possible employment and collective bargaining rights for college athletes, among other protections. On the other hand, the Republicans want a thinner bill focused on preemption of state NIL laws to create a uniform standard to address some of the discrepancies at the state level. To this point, there does not seem to be much compromise in the mix.

Given some of the recent judicial and administrative actions, including the Supreme Court Alston decision, and the National Labor Relations Board (NLRB) General Counsel’s recent memorandum (memo) providing updated guidance that certain college athletes are employees under the National Labor Relations Act (NLRA), the Democrats feel that time is on their side. The Congress has also been preoccupied with both infrastructure and voting rights bills, as well as the debt ceiling limit, so there are many congressional issues that will likely flow into next year. 2022’s mid-term elections may also make it harder to pass a bill at that time. Still, some states have more restrictive NIL guardrails than others, so there remains a desire, at least among some of our athletics departments, to see uniformity across the



Tom McMillen, President and Chief Executive Officer of LEAD1 Association

nation, but, again, the politics involved seem to be stalling any compromise at this point.

Here in Washington, at our recent annual meeting among our athletics directors, there was a lot of discussion about the potential ramifications of college athletes being classified as employees, whether through judicial, administrative, or legislative means. Like we had discussed at our meeting, about a week or so later, the NLRB released its memo on certain college athletes being classified as employees. The memo reinstates a previous NLRB General Counsel memo, administered in 2017, labeling Division I FBS scholarship football players at private colleges and universities employees, which was later rescinded under the Trump administration. While the advisory memo does not have the force of law, the irony is that if the White House were to change hands in 2024, the next NLRB General Counsel or Board could reverse the memo once again, possibly compelling Congress to intervene to address the continued flip-flop in position.

However these issues play out, we will keep you educated on the intersection between the Congress and college sports in future issues of the LEAD1 NIL Institutional Report. Enjoy the reading! ■

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TECHNOLOGY presented by Spry

How NIL Is Accelerating the Need for Educational Technology

By Lyle Adams, CEO of Spry



SPONSORED CONTENT

The educational landscape for students who also participate in college sports has experienced two major changes in the past couple of years. The first being NIL legislation and the second being the global pandemic/lockdown due to Covid 19. While these uncharted unknowns caused plenty of uncertainty, they also created multiple new channels of opportunity. NIL requirements will be a driving force in shaping education technology for the next generation of student-athletes.

THE STUDENT ATHLETE JUGGLING ACT - Post NIL

For good or for bad, the introduction of NIL into college athletics has added yet another element onto the already full plate of student-athletes. Not only are they having to shuffle their academic and sport responsibilities, now they have the opportunity to explore the possible entrepreneurial channels NIL opens up for them. And let's face it, there is a lot to learn when it comes to starting a business; there are multiple layers and possible legal, financial, and PR pitfalls to be aware of.

But, it is also a great opportunity for student-athletes to explore other possible career paths in areas such as business, law, finance, and marketing with hands-on experience, as well as a great way to build supportive networks that will last far beyond their college careers.

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FINDING AND USING THE RIGHT TOOLS

With the lockdown quickly forcing all learning outside of the traditional classroom, creative people quickly found creative solutions to keep daily life going as much as possible, and a large part of those solutions live in the digital ecosystem. Now that time has passed and we have exited the full force of lockdown, most of us still find ourselves in a hybrid new world of either wanting to or needing to lean on the technology that got us through it all.

Virtual and tech supported learning has been on the rise for a few years now, thanks to online schooling and classroom assistance software such as Blackboard. And while education technology is still in its infancy in many ways, there are so many wonderful benefits that make it an essential tool to help these college athletes who are juggling more than most.

TECHNOLOGY MAKES EDUCATION MORE ACCESSIBLE

Building educational based software can be more cost effective and scalable than traditional routes, and this makes it more accessible to more students. And software is always "on", so it makes it easier for student-athletes to squeeze in a lesson on paying your taxes when it best fits into their busy schedule, no matter if they are on their way to class or practice, or lounging in bed before calling it a day. The 24/7 access to resources empowers student-athletes to use the technology when it best suits their busy schedules. And technology allows athletic departments to easily scale their educational content based on communication with student-athletes that identifies "needs and wants" for content.



TECHNOLOGY MAKES EDUCATION MORE ENGAGING

Having educational resources hosted in a technology based solution can make it much easier to provide lessons in a variety of mediums such as videos, articles, and quizzes. This can give student-athletes the opportunity to choose content based on their learning style preferences, making it that much more absorbable and effective. A technology based education resource repository can also make it much easier to incorporate more diverse voices in the authorship of the content, granting a much broader spectrum of voices, perspectives, and representations. Education technology can help host and push out timely topics for real time conversations for even more engaging teaching tactics.

For example, Spry recently launched a new feature that provides useful education content based on a student-athlete's NIL interest and activities. Data collected from

See NIL on Page 13

Employment Rights for Student-Athletes: Is this the Next Frontier After NIL?

Despite public perception, collective bargaining and employment rights are a lot more complicated than most realize, both from a college sports enterprise and student-athlete perspective.

By LEAD1 Association

The Supreme Court Alston decision and increased pressure from states on the current college sports model has shifted the body politic on the student-athlete compensation issue. The next wave of pressure on the college sports enterprise could be regarding the employment status of student-athletes, whether through judicial, administrative, or legislative means. The potential for college athletes to obtain collective bargaining rights could lead to student-athletes being classified as employees, revenue sharing, and other major ramifications for college sports.

In fact, as mentioned in this issue's "Tom McMillen Federal NIL Scoop," this past month, National Labor Relations Board (NLRB) General Counsel, Jennifer Abruzzo, issued a memorandum to all NLRB field offices providing updated guidance regarding her position that "certain Players at Academic Institutions" are employees under the National Labor Relations Act (NLRA). Abruzzo's memo reinstates a previous memo administered by former NLRB General Counsel, Richard Griffen, in 2017, which was later rescinded, stating that Division I FBS scholarship football players at private colleges and universities are employees under the NLRA. While Abruzzo's memo does not have the force of law, it could have the practical effect

of encouraging college athletes to petition for recognition as a collective bargaining unit under the NLRA.

NLRA APPLICATION TO NON-REVENUE SPORTS

The General Counsel's memo is focused to football players at private Division I FBS colleges and universities but could also be asserted to apply to college athletes in other sports who could be considered "similarly situated Players at Academic Institutions."

In fact, in a recent interview with Gabe Feldman, Director of the Tulane Sports Law Program, on his podcast, "Between the Lines," Abruzzo said, "I think it [the NLRA] could broadly apply to other college athletes at every private school, including female athletes, if the facts establish, and they likely would, that they [college athletes] are subject to their institutions control or right to control and they are granted compensation in whatever form. I don't feel that the "revenue-generating or profit-making" aspect is dispositive so I think this would have significantly broad application across all college athletes at private schools."

NLRB'S POTENTIAL JURISDICTION OVER CONFERENCES

Although the NLRA only applies towards private colleges and universities, the memo could also affect public colleges and universities where union recognition is a matter of state law, as well as public and legislative viewpoint, with recent judicial decisions and state laws expanding compensation rights for college athletes. In addition, the NCAA and its athletics conferences may be considered "joint employers," even when some of the mem-

ber schools are public universities, if the NCAA or conferences are found to have sufficient control over the players' playing conditions. This means that the NLRB could exercise jurisdiction over an entire athletics conference, including its public schools, under a joint employer theory of liability. "I would note that even though the NLRA only has jurisdiction over private sector entities, since conferences are independent private entities, some created by private member institutions, I certainly think that we have jurisdiction over them," said Abruzzo in her interview with Feldman. The memo could also fuel more legislative actions at the state and federal levels classifying athletes as employees with collective bargaining rights.

INSTITUTIONS HAVE BEEN PUT ON NOTICE REGARDING POTENTIAL REGULATORY ACTION

Notwithstanding whether a group of college athletes petitions to form a union, the NLRB General Counsel's office has now made it known that it may aggressively pursue potential cases of unfair labor practices, which could cover any overly restrictive institutional athletics policy, particularly regarding terms and conditions of a college athletes' work environment at a private college or university. "In appropriate cases, I will pursue an independent violation of [unfair labor practices] where an employer misclassifies players...as student athletes," said Abruzzo in her memo.

JUDICIAL ACTIONS

Since Alston, the most notable court case on student-athlete employment rights has been the Ralph "Trey" Johnson et.

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Employment Rights for Student-Athletes: Is this the Next Frontier?

Continued From Page 5

al v. NCAA case in U.S. District Court, in which the student-athlete plaintiff's claim recently survived a motion to dismiss challenging the employment status of student-athletes under the Fair Labor Standards Act (FLSA). But like name, image, and likeness (NIL), it could take years for any court case, particularly under the FLSA, to arise to employment rights for student-athletes.

LEGISLATIVE ACTIONS

On the legislative front, the state of New York has introduced a collective bargaining bill, and the state of California, has introduced a revenue sharing bill. Likewise, Senator Murphy's (D-CT) congressional bill, the "College Athlete Right to Organize Act," would establish collective bargaining rights for college athletes under the NLRA covering both private and public institutions. Some federal NIL bills, however, explicitly state that college athletes would not be considered "employees." These bills, both at the federal and state level, stem from the growing public perception that college athletes are not being treated fairly, underscored by Justice Kavanaugh's concurring opinion in *Alston*.

CONSEQUENCES OF COLLECTIVE BARGAINING AND EMPLOYMENT RIGHTS

But, despite public perception, collective bargaining and employment rights are a lot more complicated than most realize, both from a college sports enterprise and student-athlete perspective. LEAD1

President and CEO, Tom McMillen, has explained that employment status may include social security and Medicare deductions, federal, state, and unemployment taxes, worker's compensation insurance, inevitably termination rights, and full taxability on income. Some employment law experts agree that college athletes do not necessarily fit "neatly" within the definition of "employee" or "independent contractor, and employment and labor laws vary from state to state. In addition, according to some experts, Title IX could certainly be implicated under revenue sharing, and any attempted circumvention of Title IX in federal or state legislative proposals could be subject to legal challenges. It is also a reality that adding employment rights could make academic success more untenable, further complicating student-athletes' already loaded plates with athletics, academics, and NIL. From a college sports enterprise perspective, grand-in-aid scholarships could be eliminated for major revenue sports, philanthropy, student-fees, and institutional support could disappear depending upon those less likely to support full commercial enterprises, and non-revenue sports may be cut, impacting our Olympic efforts, most Olympians of whom are former college athletes. In other words, many great functions of college sports could be compromised for the mere purpose of delivering extra cash to student-athletes, through collective bargaining.

ABRUZZO DISAGREES WITH POTENTIAL IMPACT ON OLYMPIC SPORTS

Abruzzo, however, does not believe that the employment status of college athletes would impact funding of non-revenue or Olympic sports. On the possibility of sports being cut, Abruzzo said in her interview with Feldman, "While compensation is not dispositive of employee status, I don't believe that the "revenue-generating or profit-making" aspects are dispositive either. It's all about academic institutions providing equal opportunities for everyone; that's what they are required to do. I've heard this before but I'm hoping that there won't be a significant impact on other players in other sports."

POSSIBLE ACTIONS TO MITIGATE PERCEPTION ISSUES

According to some labor and employment experts, college sports can, however, act to possibly undercut some of its perception issues associated with college athlete compensation, including: (1) Continuing to further address the student-athlete "package" of benefits like supporting college athletes' monetization of NIL rights; (2) preserving the academic integrity of college athletics, including institutional educational values, even despite "amateurism" being struck down by the Supreme Court; and (3) proactively implementing these above strategies and further describing the unintended consequences of college athlete employment rights, explained above, to policymakers. ■

Considering Legal Status of ‘Barstool Athletes’ in NIL Context

By Cole S. Manion, J.D. Candidate at the UK Rosenberg College of Law

Barstool Sports is no stranger to the public eye. The company has been slowly making its way to the top of internet culture for years, bringing plenty of controversy along with it.¹ Today, Barstool once again finds itself walking a fine line between controversy and success, this time in the emerging market of NIL.²

With over one hundred thousand student-athlete signees,³ Barstool Sports is one of the first media companies wholeheartedly embracing the National Collegiate Athletic Association’s (NCAA) decision to allow student-athletes to profit from their name, image, and likeness.⁴ This embrace brings with it a difficult issue for “Barstool Athlete” hopefuls: whether student-athlete partnerships with Barstool Sports violate state law and NCAA rules.

For decades, opposing sides have argued over whether student-athletes should be compensated for their services.⁵ Today,

however, legal support for student-athlete compensation is at an all-time high. Recent substantive legal support for this movement can be traced to California’s decision to allow student-athletes to be paid for their name, image, and likeness just a few years ago.⁶ And, with the watershed decision of *NCAA v. Alston* striking down NCAA limitations on education-related aid for student-athletes,⁷ the timing of the NCAA’s announcement of its new name, image, and likeness policy seems to be no coincidence.⁸

Even though there exists clear support to reconceptualize the relationship of student-athletes and profit, there are still limitations on how student-athletes can make their money. To comply with NCAA rules, student-athletes must profit in a way that complies with applicable state laws, and some states have already chosen to explicitly restrict how student-athletes may profit.⁹ Typical restrictions include prohibitions on *who* or *what types* of companies student-athletes may partner with. The most common of these restrictions are evidenced by the June 28 executive order from Ohio Governor Mark Dewine that allows student-athletes to profit from their name, image, and likeness, but “specifically restricts athletes from partnering with alcohol, marijuana, tobacco or gambling companies or with a brand in conflict with their university’s contracts.”¹⁰ In particular,

the restriction prohibiting student-athlete partnerships with gambling companies may lead to difficulty for Barstool Sports.

In recent years, Barstool has endeavored upon a seemingly strategic mission to become more involved in the gambling world. The founder of Barstool Sports, Dave Portnoy, explicitly announced his intent for the company when he stated that he is “trying to build the most forward-thinking sports gambling company” in existence.¹¹ The most notable business-related signal of this intent to be involved with gambling is the opening of Barstool Sportsbooks and Casinos around the United States, which currently exist in at least eight states.¹² Penn National Gaming, an operator of casino and racing facilities throughout the United States, also owns thirty-six percent of Barstool Sports.¹³ To further express the company’s intent to promote gambling, several Barstool podcasts and shows focus

1 See Alex Reimer, *Barstool Sports Founder David Portnoy Says His Website Isn’t Sexist*, *Forbes* (Jan. 15, 2016, 4:21 PM), <https://www.forbes.com/sites/alexreimer/2016/01/15/barstool-sports-acquisition-elevates-david-portnoy-to-mainstream/?sh=7d40bf4770e5>; *Barstool Sports*, *Social Blade*, <https://socialblade.com/instagram/user/barstoolsports>.

2 Leah Vann, *One week into NIL, lawyers caution athletes on Barstool, YOKE gaming and misinformation that could affect Iowa athletes*, *The Gazette* (Aug. 9, 2021, 10:04 AM), <https://www.thegazette.com/iowa-hawkeyes/one-week-into-nil-lawyers-caution-athletes-on-barstool-yoke-gaming-and-misinformation-that-could-a/>.

3 *Id.*

4 Michelle Brutlag Hosick, *NCAA adopts interim name, image and likeness policy*, *NCAA.org* (June 30, 2021), <https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy>.

5 See *National Collegiate Athletic Association v. Alston*, 594 U.S. __, 2–6 (2021).

6 James L. Johnston, *Regulators and Businesses Are Racing to Fill the Collegiate NIL Void*, *Davis & Gilbert LLP* (Dec. 3, 2020), <https://www.dglaw.com/press-alert-details.cfm?id=1165>.

7 *Alston*, 594 U.S. at 35.

8 See *Alston*, 594 U.S. __; Hosick, *supra* note 4 (observing that the NCAA’s decision came only two weeks after the announcement of *Alston*).

9 Hosick, *supra* note 4.

10 See Vann, *supra* note 2; Jordan Goldstein, *A Guide to All Things NIL: Kentucky*, *Romano Law* (July 24, 2021), <https://www.romanolaw.com/2021/07/24/a->

[guide-to-all-things-nil-kentucky/](https://www.romanolaw.com/2021/07/24/a-guide-to-all-things-nil-kentucky/); Joey Kaufman, *New name, image and likeness era arrives at Ohio State. Here’s how it will work starting July 1*, *The Columbus Dispatch* (July 6, 2021, 10:28 AM), <https://www.dispatch.com/story/sports/2021/07/01/ohio-state-athletics-new-name-image-and-likeness-era-arrives/7799217002/>.

11 Talia Kaplan, *Barstool’s Portnoy aims to build ‘most forward thinking sports gambling company’*, *Fox Business* (Aug. 9, 2021), <https://www.foxbusiness.com/sports/barstools-portnoy-aims-to-build-most-forward-thinking-sports-gambling-company>.

12 *Barstool Sportsbook & Casino*, Apple App Store, <https://apps.apple.com/us/app/barstool-sportsbook-casino/id1474416533>. (Barstool Sportsbook is available in Pennsylvania, Michigan, Illinois, Indiana, Colorado, Virginia, Tennessee, and Arizona while Barstool Casino is available in Pennsylvania, New Jersey and Michigan).

13 Peter Kafka, *A casino company is buying Barstool Sports in a \$450 million deal*, *Vox* (Jan. 29, 2020, 1:37 AM), <https://www.vox.com/recode/2020/1/29/21113130/barstool-sports-penn-national-deal-dave-portnoy-chernin>; Vann, *supra* note 2.

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SPORTS BETTING presented by Entain

Sports Betting Issues Deserve to Share Collegiate Training Priority with NIL —for Many of the Same Reasons

By Martin Lycka, Senior Vice President, American Regulatory Affairs & Responsible Gambling, Entain



SPONSORED CONTENT

“Moving the goal posts” is a familiar lament whenever someone feels slighted by an apparent change in the rules of a game. And, while the expression denotes a football context, its use today goes far beyond sports to all kinds of common circumstances where the meaning applies.

Indeed, while the expression has become an everyday phrase, its meaning in sports is perhaps more relevant now—and more important—than ever. Not because the football goal posts are going anywhere, but because so many of the rules in sports, and college sports in particular, are changing dramatically.

These changes affect athletic directors and staffs, coaches, athletes, campus communities, families and friends. Compared to as little as three years ago, the goal posts have moved farther away, and are likely to move even more in the years ahead. The college sports sector needs to understand these changes, gauge their impact, and introduce safeguards to make sure their programs maintain integrity and ensure responsible play on and off the field or court.

And these changes are not just Name, Image and Likeness (NIL), which has obviously been a huge focus since July 1. The legalization of sports betting, with many

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similarities to NIL, is another big change that all athletic programs need to understand.

The biggest rule change in the sports betting world took place in May, 2018. Deciding a case from New Jersey, the U.S. Supreme Court overturned as unconstitutional the Professional and Amateur Sports Protection Act (PASPA), a 1992 federal statute that prohibited offering state-sponsored sports betting. The landmark decision upheld a 2014 New Jersey state law that permitted casinos and racetracks to offer sports betting within state lines, and for other states to do likewise.

Just three years later, more than 30 states have permitted sports betting in their jurisdictions and more are considering their own measures. Some states restrict gambling on their in-state schools while athletes and students under 21 are prohibited from gambling at all.

To be sure, among those 30-plus states, no state sports betting legislation is quite the same. And there is no federal structure to provide any guidance or consistent regulation across every state. This is very similar to what we’re seeing with NIL.

This summer’s Alston NIL case, decided unanimously by the Supreme Court, further demonstrates moving goal posts, with more movement expected in the years ahead.

Between these two landmark cases, there’s plenty to speculate on further movement in the college sports goal posts. It’s important to face the likely challenges now and to prepare new programs to educate and protect a young, diverse and talented pool of athletes and staff, about the risks and remedies of sports betting. Getting ahead of these issues will help to prevent unintended consequences of harm to people and programs.

Similar to the education and resources

schools are providing for NIL, it is important to make sure the same is being done for sports betting.

What kinds of programs are available? All the major sports betting operators, including BetMGM, Entain’s U.S. joint venture with MGM Resorts International, offer responsible gambling programs. I’m proud to say Entain’s are perhaps the most innovative and comprehensive in the world. These programs often utilize a pro-active approach to potential problem gamblers.

The programs include individualized, online counseling, financial help to pay for counseling service, and automated “circuit breakers” that slow or interrupt a customer’s play when certain financial limits are met. There’s even a free app, developed by Entain, called “Gamble Responsibly America,” available through the App Store and through Google Play, with no branding or commercial promotion.

Even better safeguards are in development in the U.S. and around the world, utilizing amazing technologies and world-class research on human behaviors. Entain’s Advanced Research and Care (ARC) program is currently in testing in the U.K.—with promising results—as it merges customer data and patterns of play with risk factors identified from years of social research.

These are exciting and effective programs to keep gambling safe and fun for the vast majority of consumers. The small percentage of consumers at risk—perhaps up to five percent—likewise have some assurance that automation and individualized programs can help prevent them from playing beyond their means.

These programs are helpful for the millions of consumers who utilize the Entain
See SPORTS BETTING on Page 21

FINANCIAL PLANNING presented by TeamAltemus

Money, Contracts and ‘How to Get Started’

Average of SA Answers to the Question: “Do you Plan to Participate in NIL?”

- 50% YES
- 40% UNSURE
- 10% NO

By Courtney Altemus, CEO and founder of TeamAltemus

TEAM ALTEMUS



SPONSORED CONTENT

We ask this question every time we work with a new group of SAs. From March to June of 2021, these averages weren't too surprising. While SAs were excited for opportunities, the NIL world was new and unknown. Since June, SAs still give the same responses even as NIL wages on and some of the unsure SAs have been offered deals. The overwhelming response in discussion with those SAs about why they're unsure is, they don't know what they don't know. They're actively seeking education so they can make responsible decisions. Data from our sessions show that SAs consistently want to learn more about Money, Contracts and Getting Started.

Within each of these umbrella topics, SAs crave specific knowledge of content. Under money for example, SAs want more information surrounding budgets, taxes and spending decisions. Spending decisions are personal. When we teach budgeting, the

first thing we do is engage in a design-thinking exercise around identifying needs and wants. Design-thinking is a way of reframing the way one looks at the world and deals with issues. We teach SAs to start with themselves when it comes to budgeting. A frequent misstep for people with budgeting is they work from the outside-in and impose a framework on themselves that doesn't align with their personal goals or life situation.

This is a recipe for failure. Some SAs try to budget but it doesn't work. Design-thinking is a way to accurately define the problem first instead of trying a solution for the wrong problem. We center SAs and their goals to ensure application of processes and concepts.

Design-thinking also helps train them to think about their goals, needs, wants when making spending decisions. For a demographic that is very influenced by social media (external) messages and trends, helping SAs identify and internalize their goals also helps them use their goals to inform their overall NIL decisions. It helps them decide if an opportunity aligns with their own brand and value system. SAs are being told they can now get paid for their NIL, their *persona rights* at a time when their persona isn't fully formed. It's also a



Courtney Altemus, CEO and founder of TeamAltemus

time in development when their brains are going to default to more risky behavior. To expect them to naturally consider their values, needs and goals and build a responsible decision-making framework around it is setting them up for failure. Potential negative consequences from misaligned and/or irresponsible spending decisions can affect everyone around the SA. Their team, their coaches, the school, their families, etc. could be negatively impacted. These negative impacts can be long-term and sometimes lasting.

SAs are telling us what they need and our data shows SAs crave information about money. We're working with business schools on several campuses to ensure their SAs are getting the most comprehensive education and tools to manage their per-

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BRAND BUILDING AND SOCIAL MEDIA presented by INFLCR

Recruiting Begins to Take Centerstage In The NIL Era

By Jim Cavale, INFLCR Founder & CEO



SPONSORED CONTENT

More than three months into the NIL era, a universal truth is once again emerging: All roads eventually lead to recruiting.

Let's review the past few months through this lens...

July 1 brought freedom for collegiate student-athletes to pursue and accept financial gain related to their name, image and likeness (NIL). Some states had NIL laws, some did not. The NCAA chose not to pass national legislation, instead issuing a waiver that allowed individual institutions to set their own policies for now.

Even in absence of a national rule or law, the NCAA guidelines make it clear that pay-for-play isn't supposed to be part of the deal. Institutions and their teams are not allowed to arrange NIL compensation for student-athletes as a recruiting inducement or as reward for performance.

Athletic departments at all levels of the NCAA assembled internal "NIL working groups" or committees, typically led by their compliance teams, to prepare. They explored and implemented technology solutions, and struck partnerships with both internal and external resources to provide brand-building resources, compliance reporting and educational support for their student-athletes.

Departments rightfully sought to protect themselves and their student-athletes from running afoul of laws and regulations through education, efficiency and

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transparency.

Coaches were often invited to participate in these discussions, but honestly, the last thing coaches wanted to be part of is another meeting, especially when the rules were not even clear. *"Let me know what I need to do when you know what I need to know. I'm busy recruiting."*

This is understandable.

As NIL unfolded the way it did with a lack of national legislation, there were a lot of coaches that didn't think their school would be participating in NIL, at least in this upcoming season, because their state didn't have a law. And yet all of a sudden, the NCAA issues that waiver in June and *everyone* has NIL on July 1 whether their state had a law or not.

The first three months of NIL activity on the INFLCR platform, where student-athletes can build their personal brands, learn about and take action on NIL opportunities and report that activity to their school's compliance staff, show a few trends:

- More than 5,000 transactions were reported.
- More than \$5.7 million in transactions were reported.
- The average transaction was \$1,308.
- The median transaction was \$81.
- 54 percent of all transactions were reported by athletes from sports other than football, men's basketball and women's basketball.

This data shows a unique picture of the first few months of NIL and does so with some limitation, because many institutions require front-end NIL transactional reporting that is incomplete, such as a t-shirt business where an athlete reports the initial activity but you don't know how many t-shirts were actually sold, or the Cameo they sign up for where you don't know the

actual number of videos they do.

The reality is that the majority of the transactions taking place involve human conversations between the student-athlete and a business that wants to pay them, not completely inside of a tech platform providing an offer to an athlete where they are clicking a button saying, "I'm in." In many cases, human beings are DMing student-athletes and trying to find other ways to contact them to put these deals together.

This is the quantitative side of NIL. But there's a qualitative side that coaches experience on the front lines.

In visiting with the athletics administrations, coaches and student-athletes from more than a dozen Division I institutions this summer, the anecdotal evidence is mounting: Coaches are beginning to see that NIL plays a part in almost every recruiting conversation. They're seeing that, in those conversations, they have to be informed enough on the subject to talk about both the value their program can bring to helping an athlete grow a brand as well as to talk specifically about the actual transactions that are happening for athletes in their program.

Prospects want to know how coaches are ensuring NIL success in their program.

Thus, when coaches lose a prospect to another school where that athlete lands a big endorsement deal, the questions are naturally going to be asked: *"Did NIL cost me this recruit? Do we have a program like [insert rival] to help them get deals?"*

So now coaches are wanting to be in on the institutional conversations, and they're putting pressure on compliance and whatever working group is in play at their institution. In a lot of cases, there is limited institutional involvement, and compliance is saying listen, "we've bought this software,

See RECRUITING on Page 23

Indiana Embraces a Collective Approach to NIL

Indiana's Hoosier Hysterics NIL Collective maximizes business, booster, fan, and donor contributions to college athlete NIL monetization.

By Holt Hackney

Some LEAD1 athletics departments have embraced a collective approach to college athlete NIL opportunities. One recent example is Indiana University's (IU) Hoosier Hysterics NIL Collective, which pools resources from businesses, boosters, fans, and donors to create NIL opportunities for IU athletes. The Collective has already been publicly endorsed by Dallas Mavericks owner and entrepreneur, Mark Cuban, an IU alumnus.

The Collective essentially matches businesses that may not want to orchestrate NIL deals on their own with IU athletes and serves as a mechanism for businesses, fans, boosters, and donors to contribute to IU athlete NIL monetization without needing a reciprocal relationship from the athletes. The latter category of money is pooled together to create NIL opportunities for IU athletes in exchange for the athletes' promotion of the Collective.

To learn more about this collective approach, we recently sought out IU Vice President and Director of Intercollegiate Athletics, Scott Dolson, for an interview on the Collective and the department's overall handling of NIL, which follows below:

Question: *Tell us about how the Collective was created? How is the athletics department involved?*

Answer: "The Hoosier Hysterics guys came to us [who co-host an IU men's basketball podcast], which we really appreciate because they obviously have

a lot of enthusiasm [for IU athletics]. From a compliance standpoint, it really has been about making certain that we continually have an open dialogue with them. We provide them with information, and they understand the do's and don'ts from our end. And to their credit, they worked hard on their end in terms of hiring their own attorneys and doing their due diligence.

Their enthusiasm has been fantastic. Since it is all new from their perspective, as big fans, they wanted to do all they could on their end separate from us. We didn't direct them. We really didn't even come up with the idea. You know, it was an interesting idea—creating a unique opportunity for businesses and individuals to get involved in supporting student athletes."

Q: *Why is the Collective such a good concept?*

A: "We have some really die-hard IU loyalists, who have done a lot to generate enthusiasm for IU athletics over the past few years. I give them a lot of credit for the things they were doing in terms of having some fun interviews and creating content with former athletes, and not just men's basketball. They've done a lot with women's basketball and promoting football. This Collective is just another great innovative idea that they created, which generates interest and enthusiasm for IU athletics."

Q: *Is NIL what you anticipated? Is it working out for the athletic department and the athletes?*

A: "I'd say we're really feeling good about where we are. We started an NIL Task Force close to 14 months ago. And really from that point on, we have worked really worked hard on putting together an NIL plan."

Q: *What's the deal flow been like? Is it increasing as everyone becomes more familiar with the opportunities?*

A: "It's been steady. I think we are starting to see a rhythm, where student athletes are being entrepreneurial and figuring out how to maximize this new opportunity. At the same time, they are learning to balance that with their schoolwork and their playing careers."

Q: *With IU having such a supportive basketball fan base, strong NIL activity could certainly be viewed as providing a recruiting advantage. At the same time, specific NIL offers can't be used as an inducement. Has that been easy to balance from an athletic department standpoint?*

A: "Yes. From our perspective, our real focus is making certain that everybody really understands that it cannot be used as an inducement. The reality is that wherever you look around the country, I think everyone is paying attention to what unique NIL opportunities are happening at different places.

But we've been careful because of the high visibility of all our programs, particularly men's basketball. We spend a great deal of time making certain that we remind people repeatedly that we appreciate everyone's enthusiasm, but there's still rules.

We want to help prospective college athletes build their brands, but all within the rules. We tell them this is a great place to come if they're interested in that. But at the same time, to not use that in any way that is not according to all the rules that we have to follow." ■

INSTITUTIONAL NIL SCOOP

Ohio State Embraces Growing Workload from NIL, Shares Lessons Learned

The Ohio State University athletics department has reviewed 400 NIL disclosures, so we decided to interview them about the experience.

By Holt Hackney

On September 30, the Ohio State University's Athletic Compliance Department tweeted that its "student-athletes are very impressive! As of today, we've reviewed 400 NIL disclosures. Keep up the great work Buckeyes!!"

We wanted to find out more about how the NIL and disclosure journey has been for the university, so we sought out Paia LaPalombara, the school's Assistant Athletic Director for Compliance, for an interview, which follows below.

Question: *What was it like on July 1. Was there a lot of NIL activity immediately? Or did it just kind of build up over time?*

Answer: "It was more like a trickle that turned into a flow and then a heavier flow. Student athletes are starting to understand more of what it is, seeing what kind of opportunities are available, and just getting more comfortable with the system that we use and the reporting. So, we continue to see steady growth."

Q: *What percentage of your day is typically spent on NIL?*

A: "It varies day to day. We have another staff member in compliance, Danie Daluisio. She and I are the ones who oversee the monitoring system."

We have meetings every week to talk through different deals that are coming through. We're going in and just approving disclosures. And then it's just broader institutional questions as things come up.

You kind of hope on the front end that you've thought of all of the weird scenarios that are going to exist ... and then another curve ball is thrown four minutes later, and then another 12 minutes later. And so, it's just sort of regrouping and figuring out, okay, what do we want to do as an institution from this perspective? What is permissible? What kind of guidance needs to be provided? What kind of education needs to be provided?

Ultimately, we want to make sure that the student athletes are not putting themselves in a precarious position. And that support is provided through education."

Q: *Who informs you about the deals that are coming through? Athletes? Boosters? Are you hearing from anybody else?*

A: "It's a mix. Sometimes it's companies that will reach out to the department. We're not allowed to arrange deals, but we are allowed to forward deals along."

A lot of it is through the student athletes. And sometimes it'll be through the student athlete's NIL agent, or professional service provider."

Q: *And what about the coaches? Do the coaches come to you for any reason at all to talk about NIL?*

A: "Not as much as you would think. Their big concern is just, what are our guardrails? What can we do? What can we not do? How can we use the success of NIL to our advantage and how can we do so in a way that's permissible?"

We go to the coaches if there's a component that may impact them. We'll let them know about it. But for the coaches, it's mostly, you have to stay hands-off, you can't get involved. And so, our coaches have been very cognizant not to get involved in NIL deals and sort of turn away if they are

approached about them."

Q: *Recruiting is kind of a delicate area, isn't it? Like, "What can I say to the student athlete about NIL opportunities at our school?"*

A: "That's definitely a big part of it. And I'm sure you see all over the news, or speculation that a prospective student athlete is coming to an institution because of an NIL deal that was set up on that particular campus. I mean, that's not permissible. That would be considered a recruiting inducement. We just make sure that our coaches are aware of that, and they understand that that's not something they can do."

However, they can highlight all of the phenomenal opportunities that Columbus and Ohio and just Buckeye nation, in general, are able to provide to student athletes. And all of the individuals who are diehard Buckeye fans that would love to provide NIL opportunities. But our coaches can't connect them. They can't say, "Once you get here, you'll have X, Y, and Z deal, and you'll be able to make X, Y, and Z amount of money."

But they are able to generally proclaim how great Ohio State is and all of the wonderful things. That's one of the reasons that we put the 400 deals on Instagram is to show that, "Look, there are a lot of opportunities here. And it's not just football and basketball. It's across all of our sports."

Q: *What have you learned as a compliance professional in these last few months in terms of how to manage this whole NIL process?*

A: "When NIL came about, the expectation was it was going to be a compliance function coming through a very rigorous legislative process through the NCAA."

And so that was sort of an 11th hour switch for everyone when the NCAA pulled

See OHIO STATE on Page 23

FAU QB Perry Inks NIL Agreement with Alcohol Company

Perry's NIL deal with Islamorada Beer Company is believed to be the first NIL agreement between an alcohol company and a college athlete.

By Holt Hackney

While some state NIL laws and institutional NIL policies explicitly prohibit college athletes from entering into agreements with alcohol companies, Florida's state law does not preclude such activities nor does Florida Atlantic University's (FAU)'s NIL policy.

In more permissive NIL regulatory environments, it was somewhat inevitable that eventually a college athlete would sign an NIL agreement with an alcohol company. Recently FAU Quarterback, N'Kosi Perry, did such by signing an NIL agreement with Islamorada Beer Company in what is believed to be the first NIL agreement between an alcohol company and a college athlete. The company has five co-owners, four of whom are graduates of FAU.

The deal requires Perry to promote the brand through social media and attend at least one event per year. The amount he is being paid has not been disclosed.

Another novel component to the NIL arrangement is that the social media campaign focuses on drinking responsibly.

Islamorada Beer has asked that Perry not post pictures of himself drinking alcohol as well as not display the product around minors on social media.

We recently visited with FAU, Vice President and Director of Athletics, Brian White, to learn more about the deal.

Question: *Tell us a little bit about how the deal came about over the summer, and how you first heard about it?*

Answer: "I heard there was an interest in making it happen. And then this was kind of disclosed immediately to our compliance office. Obviously, we understand the alcohol component is a concern for some. N'Kosi is also 23 years old. And we already sell alcohol in the stadium and have alcohol signs in our stadium. I believe all the other schools in the state of Florida are operating within a very similar framework, where student athletes must be 21 years or older. That was our policy.

So, we stuck to our policy and the conversations from what I understand all went directly through N'Kosi and Islamorada. And then at the end of it, it was disclosed

to the clients as to what the specifics of the deal was. But we were not involved in that at all, other than being given a heads up."

Q: *What was your initial reaction? I mean, did you think this is a great idea? Or did you think this is probably not going to work?*

A: "The first thing you think of is: Are we following our own policies like anything else? I called the staff that actually wrote that student athlete handbook and worked more closely on it to confirm that my understanding was correct. We had created a policy fairly recently, so I don't think you can pivot and not adhere to your own policy. So once we confirmed that it was within our own policy, we were ready to go. Also, I like the fact that a lot of the messaging and intent is around responsible drinking."

Q: *Has anything else come across your desk that might be questionable, such as CBD-related, or cannabis, or anything else like that?*

A: "Nothing else that I can think of. Obviously, this was the first deal. So you are like, "Okay, wow. This is alcohol. This is new." But no, there hasn't been anything else that has made us immediately check our policy and make sure that this was okay." ■

NIL Driving Educational Technology Evolution

Continued From Page 4

our users software experience allows us to build analysis parameters which suggest content ideas to athletic departments.

TECHNOLOGY MAKES EDUCATION MORE ACTIONABLE

With educational resources living in technology, data from usage and interactions is much easier to collect. Analyzing this data makes gleaming helpful insights

much faster and more effective, leading to better iterations, targeting, and creation of future educational content. Utilizing education data also makes it easier to follow participation in educational requirements and mandates, and target specific groups or individuals that need additional reminders.

Having access to resources that empower student-athletes to effectively navigate NIL

- and be their own best advocate now as well as in the future, should go hand in hand with the NIL deals themselves. If digital education and technology solutions are a scalable and cost efficient way of getting as many student-athletes as possible the resources they need, then let's all keep pushing the envelope to make the next generation of software even better for them. ■

INSTITUTIONAL NIL SCOOP

Memphis University Development Reveals How NIL Is Becoming Invaluable Tool for Collegiate Athletics

Jalen Duren's decision at Memphis shows that NIL may become a "tool" in the "toolbox" for college sports, particularly in men's basketball, to help keep athletes from turning professional in their earlier years.

By Holt Hackney

When the most dominant big man in high school basketball reclassified from the class of 2022 to the class of 2021 and committed to the University of Memphis, it highlighted the massive impact that NIL could have on college athletics, especially in men's basketball.

What made the 6-foot-10 Jalen Duren's decision so significant was that he chose the Tigers over two other college programs AS WELL AS the NBA G-League and the National Basketball League (overseas).

NIL was a key factor.

"It eliminated the money factor," Duren said. "Because now a decision can't be made strictly off of finances. The NIL leveled the playing field. It made it where some athletes are going to be fortunate to make more in college than they would in the professional route."

Given this recent development, we sought out Laird Veatch, Memphis' Vice President and Director of Intercollegiate Athletics, for an exclusive interview about NIL and its role in recruiting.

Question: *Is NIL attractive enough to some of these athletes, who might ordinarily just go straight to the G League or to some other option in professional basketball and not go to college, to change their mind and*

go to college?

Answer: "It's definitely having an impact. I think young people want to participate in college sport and play college basketball to use your example. They know the history and the platform that it provides and the experience that it provides. And, of course, they also know they will have an opportunity to make some money.

The NIL opportunity has led young people to make the decision to go the college route. And I think that will continue to play out as these things really start to formulate, as we're seeing them now with a lot of the really large investments into NIL deals. That'll have an impact even more.

It just removes that obstacle. It makes college athletics an even more viable option for them, for young people that wanted to go that direction, but might've been tempted to look at the revenue piece that professional sports offers."

Q: *Is there anything about NIL that has surprised you?*

A: "Nothing that necessarily surprised us. The activity early on was a lot of smaller deals. And now it seems like it's shifted to really large deals that are happening more regularly.

It's really about people getting educated, whether it's student athletes, sponsors, donors, or others.

The biggest challenge we've found is that we're in a state where we don't have the ability to facilitate or help navigate those types of opportunities directly for student athletes in any way.

Obviously, the NCAA prevents any type of inducement or pay-for-play from a recruiting and business standpoint.

What we're getting, which I'm sure a lot of places are getting in one way, shape or form, is a lot of questions from potential corporate sponsors, donors, and others in the community that want to get involved.

A lot of it is education. We're trying to educate people, without crossing the line to where we're actually pulling some of these things together directly for student athletes. That's the biggest challenge we've seen."

Q: *What has it been like managing this from a human resource standpoint?*

A: "We don't have the resources in the compliance department. So, we charged Executive Associate AD, Adam Walker, who's really more of a fundraiser with an external revenue generation type experience and mindset with managing NIL. He has led the process for our department and served as the point person up until now. And we are actually just right now in the process of hiring an NIL coordinator."

Q: *There's probably a lot of synergies with Adam, given that the boosters know him?*

A: "There really is, because he has a lot of those relationships, so they know who to call. And he's readily available and they know him and have a trust level with them. I do think that that helps. And so, as we're out there, we're getting questions from people in the community about how they engage. When we say that Adam's leading it, they just say, "Oh well, I'll just call Adam." And it does help. It helps from a connection standpoint. And I do think it helps from a mindset standpoint. ■

NIL From the FAR Perspective

From one FARs perspective, the impact of NIL on academics to this point seems to be modest.

By Holt Hackney

Prior to name, image, and likeness (NIL) going into effect, there were concerns that NIL may negatively impact the academic performance of some college athletes. Of course, academics has always been a bedrock principle of intercollegiate athletics, so it is natural to discuss how increased time spent attempting to monetize one's brand could affect performance in the classroom.

We recently visited with Faculty-Athletic Representative (FAR), Paul Batista, an Associate Professor of Sport Management at Texas A&M University, on the subject of NIL and academics. That interview follows.

Question: *There has been some concern that athletes might focus on NIL as a second job (in addition to athletics) to the detriment of their academics, how is that concern being addressed?*

Answer: "Our department policy prohibits athletes from participating in NIL activities while engaged in official university or team functions such as practice, competitions, and fan days, and during final exams. Otherwise, they can use their personal time in whatever way they choose. Of course, the academic advisors monitor their grades closely, trying to ensure that engaging in NIL does not harm academic success."

Q: *How would you describe what the preparation was like leading up to the NIL movement this summer?*

A: "Our athletic department spent a lot of time discussing how to organize this so that the athletes would have as many NIL opportunities as possible. They recognize this as a potential recruiting advantage,



Texas A&M University's Kyle Field

so they were very thoughtful in how to structure the policy in a way that allowed the athletes to take advantage of this opportunity to monetize their NILs. Once the policy was in place, athletes were offered training to make sure they were aware of what they could and couldn't do.

Our compliance office spent a lot of time with coaches and recruiting personnel so they could accurately convey to prospective athletes how they could take advantage of their NIL opportunities. It appears there is a lot of interest among incoming athletes, as would be expected."

Q: *How have faculty on your campus engaged with NIL, and what are some of their thoughts on the movement?*

A: "Faculty on campus have not raised any concern or issues with me. This is something that the athletic department has organized, and I'm not sure how many faculty are concerned or involved in this in any way. It just doesn't seem to register among faculty as something to be concerned about."

Q: *How has your athletics department*

supported college athlete NIL monetization?

A: "Our compliance staff has spent a lot of time working with the athletes explaining to them what is allowed and what is not. Based on our state law, the athletes must get approved before signing, so the compliance staff has a chance to talk through the details of the contract, and the obligations of the athletes. State law requires a five-hour financial literacy and life skills workshop training before athletes are allowed to sign a contract. That provides an opportunity to explain how the process works, the obligations they might be unfamiliar with such as filing a tax return, and paying tax on their earnings, as well as address questions the athletes might have."

Q: *What has been the most challenging aspect from a FAR perspective in dealing with NIL?*

A: "I have been involved in setting out policy, so my focus has been making sure that NIL activities do not distract from academics or athletic performance. Other than that, I'm not involved in NIL on a day-to-day basis." ■

MEDIA RELATIONS presented by FINN

NIL – Seizing the Opportunity and Communicating Your Brand

By John Acunto, Senior Partner of
Consumer, Lifestyle & Sports Practice
at FINN Partners



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We are now more than 100 days into the Name, Image and Likeness (NIL) era. And boy, have things in the world of college sports quickly changed.

There are now millionaire student-athletes walking around campus. New deals are being announced daily. Student-athletes are definitely seizing the opportunity.

Sure, there are not too many seven-figure deals being handed out by companies to student-athletes. In fact, a recent survey showed that the average compensation for a NCAA Division 1 athlete with NIL was just under \$500.

What is apparent, is that each day, student-athletes are becoming more aware of the opportunities that exist in this new world of NIL and about building their brand.

And while many companies have originally targeted college football, with nearly 60 percent of all NIL compensation going to that sport, expect to see additional sports gain momentum—especially as we head towards the college basketball season.

At FINN Partners, and in these articles, we've continued to discuss the role of communications with NIL. To establish a plan, be prepared, and find the right balance in educating student-athletes, providing appropriate resources, and offering proper

guidance in helping them be successful.

We've also discussed the importance of communications staffs looking to tell NIL stories with media as a way to not only highlight the student-athletes and unique NIL deals, but as a way to ultimately put your school on the national stage.

Overall, there are plenty of student-athletes who understand the opportunity – to build their brand and earn some income. The reality is, less than two percent of all student-athletes will go on to play professionally. The window of opportunity for many as an athlete is small.

Similarly, there are many colleges that also understand the opportunity for both the student-athletes and the school. They are providing education, resources and how NIL can be a positive change for all.

With that said, let's look at a few media comments by both student-athletes and college athletic directors about the opportunity with NIL.

STUDENT-ATHLETES

“The NIL rule change has always been a dream of mine, and I didn't know if it was actually ever going to happen. I think it's great for female student athletes in gymnastics like myself because there is really no professional league after college, so we can capitalize on our opportunities right now.”

—*Olivia Dunne, LSU Gymnast who is one of the most-followed NCAA athletes on social media with more than 5 million followers across social platforms*

“We as players must use our platform and this new NIL opportunity to do good in the world. I will donate a part of any earnings I receive to help

underserved people and underserved communities. The time is now.”

—*Spencer Rattler, University of Oklahoma Quarterback*

“By allowing student-athletes the opportunity to better explore their own avenues of revenue or other items outside of the college individual setting, you're empowering them. If I can go outside to Nike or Athleta and know from there I'm valued, I can bring that sense of the value back to my school.”

—*Kaira Brown, Vanderbilt University Track Athlete*

“Because [NIL] is so hot right now, brands are more likely to give money to someone because they're an athlete... Attention isn't given. You need to figure out how to use your status to generate an audience that cares about you.”

—*Noah Buono, Duquesne University Basketball Player*

ATHLETIC DIRECTORS

“We have a tremendous number of great young people, great stories not just at NAU but in all of college athletics, that deserve the opportunity to be compensated for what they represent. This now accelerates their maturation process for young people who will ultimately be leaders and contributors in society, not just to the athletic program or a team... It's going to be a potpourri of educational opportunities all the way from rules to make sure their eligibility is protected, the dos and don'ts, but also just as importantly engage in exercises that

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LEAD1 Analyzes Ramifications of Broader NIL Deals Between Third Parties and Large Segments of College Athletes

The fundamental question for college sports is whether it should continue operating in a structure where every institution lives by a different standard and institutional involvement in facilitation of these broader NIL deals is just one example of the potential disparities across a patchwork of regulations.

Note that nothing in this article shall constitute legal advice.

By LEAD1 Association

LEAD1 Association (“LEAD1”) has been tracking some of the broader name, image, and likeness (NIL) agreements between third parties and entire teams, or in some cases, every female college athlete in an athletics department. In our previous issue of the “*LEAD1 NIL Institutional Report*,” we covered how BYU may have paved the way for companies to enter into NIL agreements with entire, or large portions of teams for use of their services. Since then, other college athletes have entered into broad NIL agreements with third parties, where in some cases, LEAD1 athletics departments have helped facilitate these arrangements. For instance, since BYU, as alluded to above, the Florida Panthers NHL team offered endorsement deals to every female college athlete at Florida Atlantic (FAU). A Miami booster offered monthly stipends to members of the football team to help promote his mixed martial arts training academies. United Wholesale Mortgage (UWM) has offered Michigan State basketball and football players monthly

stipends for the duration of their college playing careers to market UWM on social media. And TiVo has entered into NIL agreements with Georgia Tech football players to promote TiVo on social media in exchange for stipends, and TiVo goods and services.

Based upon these broader NIL agreements, one question worth exploring is the involvement of athletics departments in terms of facilitating or helping arrange these broader NIL agreements between third parties and college athletes.

INVOLVEMENT OF LEAD1 ATHLETICS DEPARTMENTS IN FACILITATION OF BROAD NIL ARRANGEMENTS

The involvement of LEAD1 athletics departments in terms of helping facilitate, or perhaps even negotiating, broader NIL arrangements between their college athletes and third parties depends upon the state law, the athletics department’s interpretation of their state law, and/or the institutional NIL policy established by the athletics department.

Florida’s NIL law explicitly states that “a postsecondary institution... may not compensate or cause compensation to be directed to a current or prospective intercollegiate athlete for her or his NIL.” In other words, Florida institutions cannot “cause” NIL agreements on behalf of college athletes. Thus, when the Florida Panthers contacted Brian White, Vice President and Director of Athletics at FAU, White, in a recent interview with LEAD1, stated that he directed the Panthers to communicate directly with FAU’s Student-Athlete Advisory Committee (SAAC), led by FAU college athletes. FAU SAAC then presented the

Panthers opportunity to rest of the FAU female college athletes, where they later negotiated a contract template for any female college athlete at FAU to “opt-in.”

LEAD1 also confirmed from a Miami athletics department source that all communications between the mixed martial arts company and its football athletes were facilitated without any athletics department involvement, but for the department’s due diligence to ensure the agreements comply with state law and institutional NIL policies.

Similarly, while Michigan’s state law does not explicitly preclude Michigan state institutions from helping facilitate NIL agreements for current athletes, Michigan State has enacted an institutional NIL policy stating that “neither the institution nor an institutional staff member may be involved in the development, operation, or promotion of any student-athlete’s NIL.” In that light, LEAD1 recently confirmed from a Michigan State athletics department source that Michigan State has not played a role in helping facilitate any NIL deals for its college athletes, including the agreement with UWM. The source told us that “those seeking partnerships are solely responsible for connecting directly with the student-athlete(s) to create any type of [NIL] agreements.”

On the other end of the spectrum, as stated in our previous issue, while (1) Utah has no state NIL law; (2) BYU was approached by Built Brands (Built) as a preexisting corporate partner; and (3) BYU was not an actual party in the NIL agreements established between Built and its football players; the framework for the

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LEAD1 Analyzes Ramifications of Broader NIL Deals

Continued From Page 17

NIL agreements, however, was established between BYU and Built. In other words, BYU was in a unique position to help orchestrate the NIL framework with Built.

In a similar vein, Georgia Tech helped facilitate the TiVo agreement with its football players. Georgia's state NIL law is a somewhat nebulous on institutional involvement, merely stating that "a post-secondary educational institution...shall not provide a current or prospective student-athlete with compensation for the use of the student-athlete's NIL." There is no other explicit language in the bill as to whether an institution may help facilitate an NIL agreement.

According to Simit Shaw, Georgia Tech's Assistant Athletics Director for Special Projects, who helped facilitate the agreement, "our interpretation of the state and NCAA regulations is that we can't be the driver for an NIL activity to take place, so in that spirit we're following the "facilitate, but not solicit or negotiate" guideline for anyone who comes to us (the school)." Therefore, upon being approached by TiVo, Shaw, in consultation with institutional legal counsel, presented the possible NIL scenario directly to the Georgia Tech football team, where TiVo later negotiated the NIL agreements directly with the players.

RAMIFICATIONS OF BROAD NIL ARRANGEMENTS FOR COLLEGE SPORTS

First, regardless of athletics department's level of involvement in facilitating these broader NIL arrangements, more and more third parties may look to spend broadly on college athlete NIL, such as with an entire team or large group of players, as opposed to spending more money on just one individual athlete. Spending more money on one player could pose more risk particularly if the player per-

forms poorly athletically, gets injured, or some other negative event occurs. For third parties aiming to maximize exposure, there is also value in associating with an entire team or athletics brand versus just one player. "There is power in a lot of players posting about the same thing, which is a force multiplier, compared to a single athlete," said Shaw.

Spending more money on one player could pose more risk particularly if the player performs poorly athletically, gets injured, or some other negative event occurs.

Second, in the cases of FAU, Miami Michigan State, BYU, and Georgia Tech, all third parties involved in these NIL arrangements have had some sort of nexus to the athletics department. The Florida Panthers are a local professional sports franchise, the mixed martial arts company is led by a local Miami booster, UWM is led by a Michigan State alumnus who made previous donations to the institution, Built was a preexisting BYU partner, and TiVo had been working with a former Georgia Tech athletics department staff member, who connected TiVo with the athletics department.

Third, in addition to players receiving compensation, NIL is opening an additional door for athletics departments to orchestrate separate sponsorship agreements with third parties already doing NIL deals with the department's athletes. For instance, in addition to the TiVo agreement directly with the football players, Georgia Tech's multimedia rights partner, Legends, contracted with TiVo

for use of Tech's intellectual property. In other words, both the athletics department and the athletes have entered into NIL agreements with TiVo. So, while sponsorship agreements have traditionally presented themselves through very defined paths in college sports, NIL has opened a new door for possible additional athletics department sponsorship opportunities.

Fourth, Title IX questions could emerge, particularly when athletics departments help facilitate NIL arrangements for one gender. While third party payments to athletes would unlikely trigger Title IX scrutiny (because the third parties involved likely do not receive federal financial assistance), Title IX scrutiny could emerge regarding equitable treatment (e.g., 13 program areas listed in Title IX regulations and policy interpretations) based on the possible benefits received by one gender over the other gender, particularly when athletics departments are involved in facilitation. That said, however, Title IX compliance is mainly judged on a program wide basis, not a team-by-team basis, so athletics departments should take a holistic approach regarding providing equitable benefits to both genders throughout their programs.

In short, the issue of athletics departments facilitating these broader NIL agreements depends upon the NIL regulatory structure that a particular institution lives within, however, as of now, the benefits of these broader deals seem to be outweighing any potential costs. The fundamental question for college sports is whether it should continue operating in a structure where every institution lives by a different standard and institutional involvement in facilitation of these broader NIL deals is just one example of the potential disparities across a patchwork of regulations. ■

NIL and the Impact on High School Sports Participation

NIL could create a shift at the high school athletics level that may impact college sports in the future.

By LEAD1 Association

While the NCAA has stated that high school students may engage in the same types of NIL opportunities available to current student-athletes under its interim policy without impacting their NCAA eligibility, the same might not be true for high school competition. In fact, engaging in NIL activities as a high school student may render that student ineligible for high school sports, thereby creating more incentives for high school athletes to play club sports or transfer to private schools, instead of playing for their public high school. This possible shift could impact college sports competition, and many have strong views about the importance of participation in high school sports. In that light, LEAD1 Association (“LEAD1”) hosted a recent webinar on NIL and the impact of high school sports competition. The virtual forum was moderated by Dr. Karissa Niehoff, CEO of the National Federation of State High School Associations (NFHS), which is the national leader and advocate for high school athletics, representing member state high school associations in 51 states and the District of Columbia. The panel also featured Anson Dorrance, Head Women’s Soccer Coach at the University of North Carolina at Chapel Hill, and James Parker, Director of Athletics and Student-Activities, at Alexandria City Public Schools, in Virginia. **Here are the important takeaways from the panel:**

NFHS has made it clear that NCAA NIL rule changes do not affect current high school student-athletes. In fact,

Niehoff kicked off the webinar stating that while NFHS recognizes the talents of high school student-athletes, its member state associations have rules in place that prohibit student-athletes from receiving money that is connected to wearing their school uniform. That said, NFHS, however, can only suggest guidelines and make recommendations so ultimately each state high school association determines its own eligibility rules. And, to this point, many states have not made it clear whether their athletes are prohibited from NIL activities.

Given NFHS’s position, it could create a shift in high school athletes transferring to private high schools or participating in more club sports, instead of playing for their high school teams. Indeed, according to Parker, overly restrictive high school NIL rules could create a trend in more high school student-athletes transferring to private schools that don’t restrict NIL opportunities. Dorrance believes that high school student-athletes should be allowed to “monetize their passions,” and that high school associations should find “compromise” so that high school athletes can pursue more entrepreneurial opportunities, aligned with the recent changes at the college level.

NIL could create opportunities for state high school systems to help student-athletes learn more about entrepreneurship and business at a much earlier age. According to Dorrance, NIL could create more opportunities for entrepreneurs in local communities to help teach high school student-athletes about business. In fact, he believes high school systems should develop more specific curriculum based upon helping students grow their brand. Attending public high school already provides significant social and communal benefits, according to Dorrance, so pairing those values with NIL catered education would be

very beneficial for student-athletes. Parker explained that high schools might even be able to help some student-athletes broker NIL deals in their local communities and ensure that the deals are bona fide and compliant with applicable regulations. Of course, this is subject to NFHS member policies, and each state might act differently in terms of their future NIL policies.

NIL at the high school level could help student-athletes learn to better manage conflict earlier on. A student-athlete’s teammate making more NIL money or getting more media opportunities could create inherent conflict in terms of camaraderie on a high school sports team. But sports are supposed to be a place for students to learn how to better navigate life issues, beyond the playing field, Dorrance said.

According to Dorrance and Parker, youth athletes should have the same NIL opportunities that college athletes have, particularly for female athletes. It is no secret that those athletes who know how to best brand themselves will have the most NIL success. Starting NIL at the high school level would allow student-athletes, particularly female athletes, to start the learning process in terms of maximizing their future earning potential off the field, while they continue to fight for equal pay (at least professionally) on the field, in professional soccer, for example.

So, while NFHS has made it known that NCAA NIL rule changes do not apply to high school athletes for now, more conversations like these from college sports stakeholders could help shape the future of youth sports, as we continue to move into a new era of sports competition. ■

Will the NCAA's NIL Ruling Impact Collegiate Esports?

By David A. Moreno Jr. and Alvin Benjamin Carter III, of Brown Rudnick

In 2014, Kurt Melcher, an associate athletics director at Robert Morris University, called up an executive at Riot Games, which publishes the popular video game League of Legends. The reason? He was laying plans to form the first collegiate esports team.

“This is such a team-based game, why couldn't we go and treat it like baseball, like basketball, like soccer?” Melcher [wondered](#). “Get the best players, scholarship them and bring them to our school.”

In six months, he'd done just that, finding sponsors to fund uniforms, a facility, and 35 partial scholarships. Three thousand inquiries to join the team flooded Melcher's inbox; 2,000 new students applied to the school. Fast forward to 2021, and hundreds of others have followed in Melcher's footsteps: the National Association for Collegiate Esports (NACE) now [has](#) over 170 member schools that together have provided more than \$16 million in esports scholarships.

One might think, given all this interest, it'd be the NCAA in charge and not a newcomer like the NACE. But in 2019, the NCAA officially chose not to govern esports. Their primary justification, according to Melcher – who is now the Executive Director of Intersport, which led the task force responsible for persuading the NCAA – [was their](#) “inability to get past the fact that gamers might come to college after earning money, have a personal brand already built in their streaming following, and could easily have a sponsorship deal in place...prior to accepting an NCAA scholarship.”

In other words, the NCAA chose not to govern esports because of their amateurism definition – a definition they amended this year with their new name, image, and likeness (NIL) policy. Though the full impact of this decision on collegiate esports is still

uncertain, new questions and opportunities appear to be on the horizon: Will the NCAA rethink its stance towards collegiate esports? What benefits and lessons might this offer esports? And what can esports – which has long allowed young players to profit of their name, image and likeness – offer the NCAA?

THE NCAA, NIL, AND ESPORTS: A BRIEF PRIMER

As noted above, the NCAA chose not to govern esports in 2019. While the amateurism definition was a key issue, the committee also [cited](#) potential Title IX issues (esports is a male-dominated arena) and the violence of certain video games. As of now, [only](#) 8.2% of collegiate esports gamers are women, but interest is there: one study [shows](#) roughly half of women gamers participate in video games that belong in the esports category.

In light of the NCAA's decision, other esports leagues have cropped up, including the NACE and the Electronic Gaming Federation (EGF). These organizations permit gamers to license their names, images, and likenesses to sponsors.

Now, the NCAA is allowing their players to do the same. Their [interim policy](#) (active July 1, 2021) allows student-athletes to sign NIL licensing deals from third parties but prohibits pay-for-play (i.e., universities can't pay students to play for them) and impermissible inducements. These rules are of course superseded by various state laws – there are approximately 30 thus far and more on the way – and NCAA schools might have their own NIL policies as well.

No matter the specifics, one would expect that with the amateurism issue out of the way and esports' popularity surging (especially amid the pandemic), the NCAA might reconsider their stance – creating new opportunities, benefits and learnings for the NCAA, esports, and the students and schools

who participate.

WHAT THE NCAA CAN DO FOR ESPORTS

If the NCAA *does* choose to govern esports, there could be a number of benefits to esports, including:

- *Better regulated competition.* The NCAA has extensive experience and resources when it comes to providing fair competition, standardized rules, and compliance. These are not insignificant issues when it comes to esports, which has been wrestling with drug testing and cheating matters.
- *Improved diversity and inclusion in esports.* If the NCAA were to govern esports, schools would be under more pressure to tackle the Title IX issues inherent in a sport so dominated by men. The NCAA, which is familiar with these issues, could help esports and participating schools take steps in a positive direction – while also implementing measures to facilitate safer environments for women gamers.
- *Ensuring the overall wellbeing of student gamers.* The NCAA's mission statement focuses on students-athletes' wellbeing and academic success. It could institute and enforce rules that would help ensure student gamers are not lagging behind academically or walking into potentially exploitative deals. The latter is already happening at the school-level in response to NIL policies: the athletic department at Nebraska, for instance, recently [launched education and support](#) for its athletes in this respect.
- *Improving esports' reputation and legitimacy.* Though esports has fast become a legitimized sport – especially amid COVID-19 – the NCAA's participation would go a long way towards legitimizing it even further, while also creating oppor-

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Will the NCAA's NIL Ruling Impact Collegiate Esports?

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tunities to increase its exposure and reach. Perhaps there could be even something akin to a traditional sports draft that helps create a more structured way of becoming a professional esports gamer.

WHAT ESPORTS CAN DO FOR THE NCAA (AND ITS MEMBER SCHOOLS)

The NCAA – and the schools it works with – could also greatly benefit from esports on various fronts, such as:

- *NIL policies.* Gamers in esports have always had the independence to license their names, images, and likenesses. Now that the NCAA has agreed to allow its student-athletes to do the same, they could look to collegiate esports for guidance and best practices – especially in this interim period.

For example, this experience could shine a light on issues that may arise with conflicting deals. As Melcher [describes](#), “I knew if we were going to have a suc-

cessful program, we would have to honor the existing partnerships the players came to our school with. If we had a mouse deal with the program, we would exclude that student from the mouse company deal if they had a competing mouse deal and make sure that player was not of any promotions that would cause conflict with his existing deal.”

- *New partnerships and recruitment opportunities for schools.* Esports opens up entirely new avenues for partnerships (and recruitment) that could benefit universities the NCAA serves. The University of Kentucky, for instance, has [partnered](#) with JMI sports for the naming rights for their new esports facility and struck a deal with established esports franchise, Gen.G.

These deals show that NIL policies don't have to come at the expense of university partnerships and revenue. As NACE's director [told](#) the *Washington Post* last year,

“Whether the esports team is part of the athletic department or the engineering school, we believe esports' success is due to its flexibility, allowing the school to obtain sponsorships while encouraging the gamers to develop their own broadcast channel and licenses. It is all about helping the athlete build their personal brand, which in turn aids the college in the long run.”

LOOKING FORWARD

Much remains to be seen when it comes to the NCAA and collegiate esports. But one thing is clear: esports' momentum [shows](#) no signs of slowing down. The same could be said of student-athletes' desire for NIL opportunities.

As these new trends gather steam, there's ample potential for the NCAA and esports to come together, learn from one another, and create value for students, schools, and the esports industry at large. ■

Sports Betting Issues Deserve to Share Training Priority with NIL

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platform. But we recognize that the college and university community might be a microcosm with different, more specialized needs than the mass market. This is where education can spell the difference between responsible gambling and risky behaviors.

Do we really need more education in a structured education environment? Absolutely! Incredible changes in sports betting have already occurred that were never predicted. And the pace of change is accelerating with new products, promotions, technology and international scale.

The college athletic community, and the broader academic community, includes athletes and others who may have little or no previous exposure to gambling or education in gambling responsibly. It's a population that needs to be trained on sports integrity,

match-fixing, point-shaving and to discern right from wrong, often in a heated competitive environment where financial temptation can be intense, persuasive and pervasive.

Athletic departments—and university administrators—need to recognize the moving goal posts and to establish programs to ensure against potential problems.

That's why more than 40 colleges and universities and sports leagues have signed on to a training program conducted by EPIC Risk Management to train athletic directors, coaches, athletes and league officials about responsible gambling, and identifying risks and ensuring integrity in sports programs. EPIC's programs are the global benchmark for training college-level sports organizations, to help prevent abuses and to maintain sports integrity.

By applying academic, athletic and industry resources and experience, college and university athletic programs can take the initiative to ensure responsible gambling in their programs and on their campuses. They can face current challenges and be in a better position to anticipate and address new ones as they arise.

The time is now; the goal posts are moving. ■

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Considering Legal Status of ‘Barstool Athletes’ in NIL Context

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on gambling or regularly advertise with gambling companies.¹⁴ In sum, Barstool has expressed its intent to become closer to a gambling company and has substantially acted to effectuate its intent.

A reasonable implication of Barstool’s strategic mission is that its recent behavior warrants the moniker of “gambling company,” making student-athlete partnerships with the company violative of what few NIL regulations exist. At least one athletic department, the University of Louisville, has already admonished its student-athletes to avoid any relationships with Barstool. In a department-wide email, one official stated “Barstool Sports . . . does not comply

¹⁴ See generally *Pardon My Take*, Barstool Sports; *Barstool Bets*; *Barstool Pick Em*; *Picks Central* (not every Barstool Sports podcast or episode relates to gambling; however, these podcasts are most closely identified with gambling) (download using Apple Podcasts or Spotify).

with the criteria outlined in the Kentucky Governor’s executive order.”¹⁵ This gives a quick glimpse into how Barstool’s unknown status could be treated by athletic departments nationwide.

Whether its relationships with gambling necessitate Barstool being characterized as a “gambling company” is still yet to be seen. While gambling-related partnerships suggest a desire from management to be inextricably linked with gambling, Barstool could also still be fairly categorized as, principally, a sports media company. It could even be possible to divorce the gambling side of Barstool from the sports media company most student-athletes and college students know. But, since there is little explicit guidance on how to apply scarce state NIL laws, Barstool’s current status in

¹⁵ @DarrenHeitner, Twitter (Aug. 9, 2021, 10:45 PM), <https://twitter.com/DarrenHeitner/status/1424924871277129740>.

the context of existing NIL legislation is ultimately ambiguous.

Until the NCAA or state legislatures render a definition of “gambling company” for NIL purposes, it will be up to individual athletic departments around the country to determine how they treat student-athlete relationships with Barstool.¹⁶ Because of Barstool’s strategic move to become increasingly involved with gambling, however, it should come as no surprise when being a “Barstool Athlete” becomes a violation of NCAA rules or state law. Given this potential for thousands of student-athletes to fall out of compliance at a moment’s notice, it would be prudent for athletic departments to identify whether their athletes are implicated under this issue and construct a strategic plan for how to handle their athletes’ relationships with Barstool Sports. ■

¹⁶ See Vann, *supra* note 2.

NIL – Seizing the Opportunity and Communicating Your Brand

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help them build their brand,”

— *Mike Marlow, Northern Arizona University Athletic Director*

“I am excited for our student-athletes and student-athletes across the country to be able to monetize their name, image and likeness, just like the students on our campus. I think it’s a natural progression.”

— *Rick George, University of Colorado Athletic Director*

“When we talk about recruiting, I feel like NIL is just like anything else. You show people your facilities. You talk about academics. You talk about your school. And then now, we’re going to be talking about NIL on top of that, and what type of resources we’re providing our student-athletes, how

they’re doing in terms of their brand and in terms of social media and how they’re doing in terms of monetizing from their name, image and likeness.”

— *Terry Porter, Towson University Associate Athletic Director*

As you can see, there has been no shortage of comments by both student-athletes and athletic directors on NIL.

So, the question is, as a communications staff, how are you approaching NIL from a media standpoint? What are you doing to highlight student-athletes and help them build their brand? How are you helping your athletic directors, and showcasing how they are pioneering the way for NIL, and creating new opportunities for both student-athletes and the college?

This is a new beginning for college sports,

but also a great one. One that was long overdue in the eyes of many, and one that can benefit everyone.

Take the opportunity to seize this historic time in college sports. Tell your story. ■

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Money, Contracts and ‘How to Get Started’

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sonal finances. We adjust our curriculum to complement concepts being taught by the business school and use our athlete pedagogy to reinforce them. We bring the real-life education and tools they can apply immediately. Our success depends on how successful SAs are in life now, not how well they perform on a test.

Institutional budgets are still impacted from Covid cancellations and the lack of uniform regulations makes it difficult for schools to decide where to direct funds. SAs are telling us they want more protective education. Longer term program-building and talent retention will be highly correlated not just to the amount of money SAs can

make, but also the infrastructure and programming to help them protect themselves and the money they make.

In the recent article in “Inside Higher Ed,”¹ Adrienne Larmett, Sr. Mgr. in Baker Tilly’s Risk Advisory practice addresses the need for this infrastructure:

There is a “growing gap between institutions that have funds to support college athletes — by providing training in financial literacy, social media and marketing, for example — and those that don’t. That

¹ Inside Higher Ed, “Some College Athletes Cash In While Others Lose Out” October 12, 2021 By Maria Carrasco

gap might impact how institutions recruit and attract as well as retain top talent,” she (Larmett) says.

“The prospects might be looking to attend institutions that have infrastructure and support systems to help them maximize their NIL potential,” she says. “Existing student athletes might look to transfer to institutions where those schools have infrastructures to help them.”

SAs are asking for protective education, specifically about money, contracts and how to get started. Not only will the programs that deliver this education attract and retain talent, they will also help their SAs develop critical skills for life ■

Ohio State Welcomes a Flood of NIL Deals

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out. If you read the policy, it is very bare bones. The compliance piece of it is actually quite minimal.

One thing that has been helpful is, from the beginning, it has been a collaborative effort on campus where it is legal and trademark and licensing and communications and digital media, and just bringing all of those groups together. That really helped us. And we have since doubled down on those efforts of just making sure it’s a really

collaborative effort across campus.

For example, if a student athlete is going to be doing a deal with Adidas, then you want to make sure that your individuals who are involved in the Nike contract are aware of that and can give a heads up to Nike. It’s not like they can stop the deal, but they’re able to provide that courtesy. And making sure that the communication staff is aware of that or the facility staff. So that student athletes aren’t doing deals in the

locker room if they’re not supposed to be.

It really is just ensuring that the education has been done broadly across campus. Looping in individuals is probably the biggest lesson; just making sure that even groups that you would not think would need to have that education are included in the conversation. Eventually you find out, oh, yes, they definitely need to be aware. They need to be in the loop. And we need to include them in these weekly conversations that we have, because there is a pretty big impact from a university perspective as well.” It really is just ensuring that the education has been done broadly across campus. Looping in individuals is probably the biggest lesson; just making sure that even groups that you would not think would need to have that education are included in the conversation. Eventually you find out, oh, yes, they definitely need to be aware. They need to be in the loop. And we need to include them in these weekly conversations that we have, because there is a pretty big impact from a university perspective as well.” ■

Recruiting Begins to Take Centerstage

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we’ve created this program with this name, we’ve got this education plan, be patient.”

But coaches aren’t patient when their jobs rest on getting the best talent possible. There’s this back-and-forth between the coaches and the athletics administration that is putting pressure on the administration to find new ways to help. Because if they don’t, coaches feel like they can’t compete — especially in the absence of

national rules and laws.

So how can institutions quantify and tell the story of their student-athletes’ NIL success without directly arranging that success? How do they empower their coaches to recruit effectively in this new era without creating recruiting inducements?

The answers to these questions are the next frontier of NIL. ■