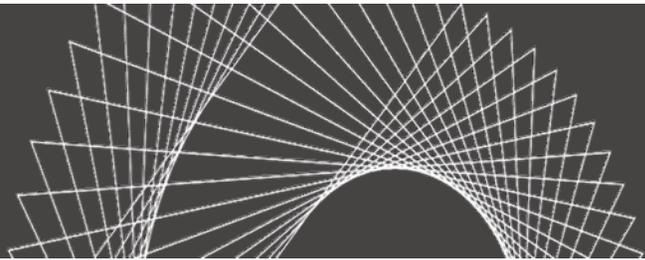


# LEAD1 Forum

## *Name, Image and Likeness Compensation for International Student Athletes*



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# Agenda

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- Immigration 101 – brief overview of U.S. immigration system
- Nonimmigrant (temporary) visas vs. immigrant (permanent) visas
- F-1 student visas
- Concepts involved in NIL consideration
- Work/employment vs. income and compensation – key factors to consider
- Sample scenarios in NIL context
- Enforcement of status violations
- Possible solutions
- Q&A

# Governing Law

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- Immigration and Nationality Act (INA) – adopted in 1952
  - Major amendments in 1965, 1986, 1996 and 2005
- Regulations proposed and adopted by administrative agencies
- Presidential executive orders/proclamations
- Agency guidance (memos, policies, Q&A with stakeholders)
- Adjudication practice

# Government Agencies Involved

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- **Department of Homeland Security (DHS)** – formed in 2003; incorporated functions of the former Immigration and Naturalization Service (INS):
  - **U.S. Citizenship and Immigration Services (USCIS)** – adjudication of petitions and applications
  - **Customs and Border Protection (CBP)** – border patrol, apprehensions at the border, airport and land port of entry clearance
  - **Immigration and Customs Enforcement (ICE)** – investigations, interior apprehensions, detention of undocumented immigrants
    - **Student and Exchange Visitor Program (SEVP)** – administration of the SEVIS system and the foreign student program at U.S. colleges and universities

# Nonimmigrant vs. Immigrant Visas

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- In the U.S. temporarily
  - Presence in the U.S. is normally limited to specific time period
  - Presence in the U.S. pursuant to specific purpose (e.g., student, temporary worker, visitor)
  - Limitations on allowed activities, especially employment
- In the U.S. permanently
  - Lawful permanent resident or “green card” holder
  - No expiration date of immigration status
  - Generally, no limitations on employment or other activities

# Visa Types – “Alphabet Soup”

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- A – diplomats
- B – visitors (B-1 – visitor for business; B-2 – visitor for pleasure)
- C and D – air or marine crews
- E – investors in U.S. economy
- **F – students**
- G – employees of international organizations (UN and NATO)
- H – employees of U.S. companies
- I – journalists
- J – exchange visitors (professors, researchers, graduate students)
- K – fiancés of U.S. citizens
- L – intracompany transferees
- M – trade school students (flight and fashion schools)
- N – NATO employees
- O – individuals of extraordinary ability
- P – athletes and performers
- Q – international cultural exchange (folk dance companies)
- R – religious workers (priests, ministers)
- S – informants and spies (“snitch visa”)
- T – victims of human trafficking
- U – victims of serious crimes
- V – family members of U.S. citizens and permanent residents

# F-1 Visa for Students

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- Undergraduate or graduate degree at a U.S. university (full-time study)
- Duration: as long as it takes to finish the degree
- Employment allowed:
  - On campus – up to 20 hours/week
  - Curricular Practical Training (CPT) – for work performed during academic program that is an “integral part” of the curriculum
  - Optional Practical Training (OPT): 12 months after program completion
    - If STEM degree, additional 24 months allowed
    - Employment must be directly related to the major field of study
    - OPT work should be full-time (20+ hours/week) and MAY be unpaid (volunteer vs. paid employment); self-employment is allowed.
- CPT is authorized by the school; OPT is authorized by DHS
- Economic Hardship Employment Authorization – must show individual economic circumstances that warrant it (cannot be the REASON to facilitate NIL income without showing dire financial situation) – authorized by DHS
- **NO OTHER EMPLOYMENT ALLOWED**

# Concepts Involved in NIL Considerations

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- Employment / work / labor
- Commercial transactions / commercial activity
- Active / passive income
- Ownership of intellectual property
- Income
- Royalties
- Immigration status violation

# What is Work or Employment?

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- No single definition of “work” or “employment” that covers all situations
- Department of Labor provides definition in Fair Labor Standards Act, but no direct correlation to immigration context
- Immigration and Nationality Act (INA) and DHS Regulations
  - Provides descriptions of the activities that each nonimmigrant visa category is permitted to engage in – contemplates activities beyond an employer/employee relationship and with/without compensation for “vocation, professional work, or other work”
  - F-1 students are inadmissible if they intend to “perform skilled or unskilled labor”
  - F-1 students are removable/deportable for any violation of immigration status
  - Employer sanctions – unlawful for an employer to employ or hire an individual who does not have authorization to work
  - To engage in any work outside the currently allowed F-1 employment activities, Congress/DHS would need to grant authorization

# Key Questions to Consider

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No clear guidance on NIL, so we have pulled these from labor law, tax law, case law, policy and agency guidance.

- What is the foreign national actually doing?
- Where is the activity being performed?
  - Location of activity is VERY important – no U.S. immigration status while physically outside the United States
- Where is the principal place of business?
- Are the activities incidental to work principally performed outside the U.S.?
- Where do the profits accrue? Who benefits?
- Is there pay or compensation? Is pay or compensation required?
- By performing the activity in question, is the foreign national displacing a U.S. worker who would normally be paid?
- Is this passive or active income?
- Is the participation material?

# Scenario 1 – Advertising Space

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James is an F-1 student in the U.S. who has a large following on his website that he created when he was living in his home country prior to coming to the U.S. on an F-1 visa.

A brand approaches him about placing ads for their products on his website. Every week, he would get money from advertising on the site.

**Is he allowed to receive this money?**

## Scenario 2 – Royalty Income

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Maria is a student who has recorded volleyball tutorial videos before becoming an F-1 student, when she was living in her home country. She sells the rights to access the videos to coaches around the world.

She has sold the rights to broadcast her videos to two volleyball teams in California and received money in her U.S. bank account.

She is going to set up a website where teams can pay online to access this content on a pay-per-view basis.

**Is this OK to do?**

# Enforcement

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- Schools do not typically search for work violations on social media or online and do not usually directly use information gathered on the Internet to report status violations to the government.
- BUT if someone reports a violation and there is clear evidence of it, schools are REQUIRED to report that information to SEVP.
- Evidence could come from
  - Business partners or customers
  - Teammates or friends
  - Employers
  - Student himself/herself
- Government agencies can investigate NIL activities based on media reports, social media posts and any other tips they get
- DHS/ICE/SEVP is likely to take a broad view of what constitutes work or employment

# Consequences of Status Violation

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- Ineligibility for future immigration status, like O-1 (individual of extraordinary ability) or P-1 (professional athlete)
- Ineligibility for green card/permanent residence
- Appearance of employment without authorization causes difficulties because it creates a perceived status violation at
  - Embassy when applying for a visa
  - Port of entry when entering the country
- Interferes with demonstrating non-immigrant intent, i.e., intent to depart the U.S. after the end of the academic program
- May trigger investigation into tax compliance / compliance with other areas of law

# Possible Solutions

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## ■ Legislative fix

- Amendment to Immigration and Nationality Act specifically authorizing NIL activities

## ■ Regulatory fix

- DHS regulations – have to go through Notice & Comment

## ■ Regulatory guidance

- DHS/SEVP can establish a general policy that NIL activity authorized under a state statute would be permissible for all F-1 students, incident to their immigration status
- No SEVP guidance to date. June 21, 2021 SEVP broadcast message:

“The Student and Exchange Visitor Program (SEVP) is aware of and actively monitoring proposed federal and state legislation pertaining to the use of name, image and likeness for student athletes, including F and M nonimmigrant students. The program is working with its partners within the U.S. Department of Homeland Security to review how this legislation affects international student athletes and will provide updated guidance via Broadcast Messages, Study in the States, social media and SEVP field representatives.”

# Questions?



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