



Wednesday, December 6

Time (EDT)	Session
8:30 a.m.	Breakfast and Registration
9:00 a.m.	Welcome Remarks
9:05 a.m.	Student-Athletes in the Post-Alston Age of Name, Image & Likeness Robert E. Freeman
9:55 a.m.	Labor Law Update and the Revitalized Organizing Landscape Joshua S. Fox and Howard Z. Robbins
10:45 a.m.	Break
11:00 a.m.	Navigating the Future of DEI: Legal and Practical Considerations for Employers Mark Bunbury Jr. and Evandro C. Gigante
12:00 p.m.	Program Ends

Speakers

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To access the materials from this session, please visit:
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2023

SPORTS LAW CLE SERIES

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Student-Athletes in the Post-Alston Age of Name, Image & Likeness

Robert E. Freeman

Co-Head, Tech Media Telecom Group
Member, Sports Group

Proskauer»

Agenda

1

**Intro +
How We
Got Here**

2

**Legal
Landscape
and the
Start of the
NIL Era**

3

**NIL
Compliance
Issues**

4

**NIL
Litigation**

5

**Final
Thoughts**

Our (AI) Student Athlete Endorsers for Today



SPORTS LAW
CLE SERIES



The Pros and Cons of College Sports NIL

Name, Image, and Likeness a Game Changer for College Athletics

College football is booming, after all the hand-wringing, thanks to NIL and the transfer portal

How Small School Athletes Can Make Money Through NIL

How NIL, transfer portal have surprisingly brought some much-needed talent parity to college football

Sure, the game still has its behemoths, but the riches are being spread out

By Dennis Dodd Oct 5, 2023 at 2:54 pm ET • 6 min read



PROS

In choosing colleges, top young athletes say: "Show me the NIL"

'There's no rules. It's crazy': New money in NCAA recruiting leaves elite athletes ripe for exploitation

"If you make a mistake, it could cost you your whole college career," said one top high school football player.

New Endorsements for College Athletes Resurface an Old Concern: Sex Sells

Female college athletes are making millions thanks to their large social media followings. But some who have fought for equity in women's sports worry that their brand building is regressive.

Our View Editorial: NIL another fine NCAA mess

The Herald Bulletin Jul 13, 2022



NIL Hurts College Athletics. Here's How We Fix It

By Cody Orr | @cody_orr | May 23, 2022, 8:00am CDT | 9 Comments / 9 New

f t SHARE



Almost a year ago, the NCAA created new rules that allow college athletes to earn money by selling access to their "name, image, and likeness". Since then, we've been inundated with stories of greed, betrayal, and manipulation worthy of a Shonda Rhimes series.

CONS

The NIL Era:

Big Time College Athletes Are Essentially “Pros” Now



NIL Op-Ed

Column | NIL has its flaws, but it is still an inherently good system



TPN File Photo

By [Brian Sherry](#), Staff Writer
JUNE 8, 2022

“Ultimately NIL achieves its goal of benefiting college athletes ... this is the new era of NCAA sports. An era where the athletes themselves hold all the power and that is ultimately a good thing.”

OPINION
GUEST ESSAY

College Sports Are a Treasure. Don't Turn Them Into the Minor Leagues.

March 23, 2023



By John I. Jenkins and Jack Swarbrick

Father Jenkins is the president of the University of Notre Dame, where Mr. Swarbrick is director of athletics.

“[College athletics] faces threats on a number of fronts:

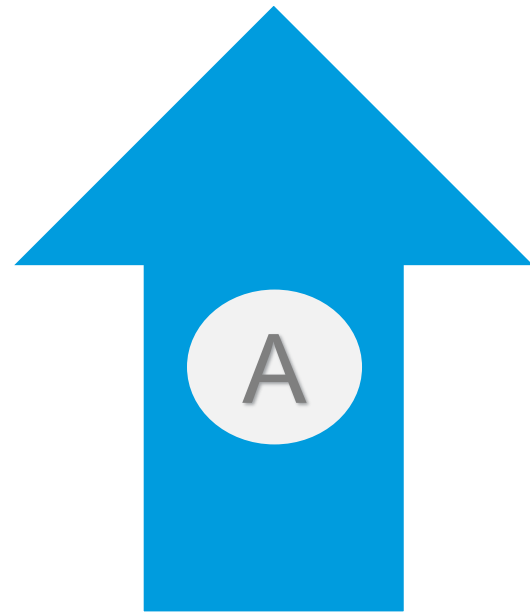
.. the growing patchwork of .. confusing state laws regulating [NIL],

... the specter of crippling [NIL] lawsuits,

... the profusion of dubious name, image and likeness deals through which to funnel money to recruits,

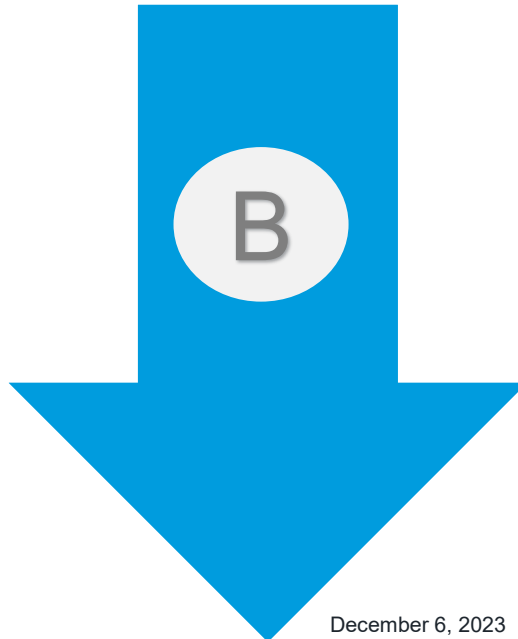
.. Professionalizing teams, treating athletes more as employees than as students and weakening the vital connection with the educational mission of their colleges will rob college athletics of its special character. Gradually it will be seen as merely a version of the professional minor leagues.”

Audience Poll: NIL in College Sports?



Long-Overdue, Mostly
Beneficial for Athletes
and College Sports?

Somewhere in
the Middle: Pros
and Cons on
Both Sides?

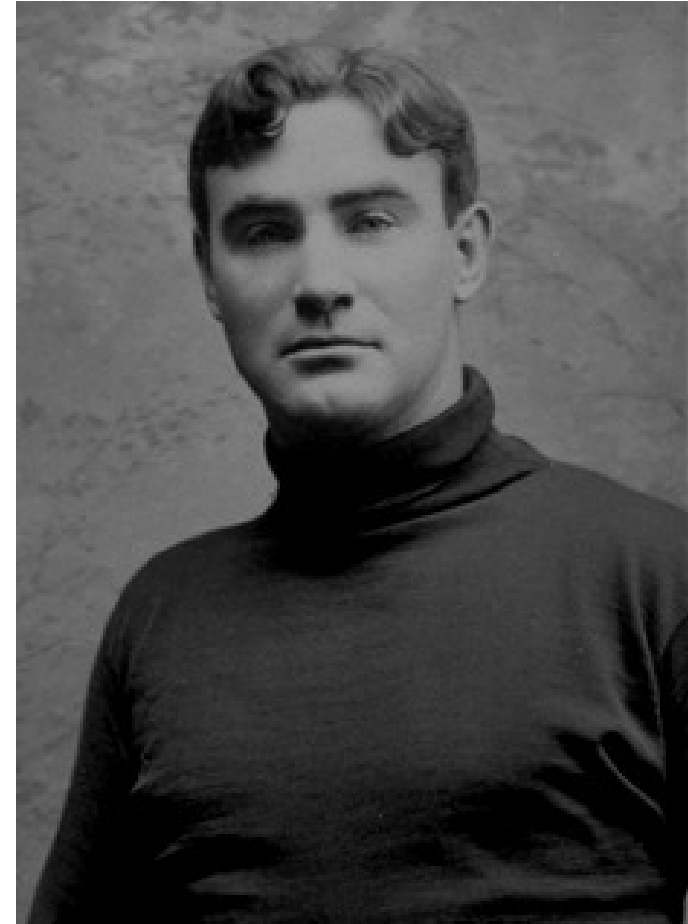


Additional Compensation
to Athletes Was Long-
Overdue, but Current
System Is Not Beneficial
to College Sports or
Lacks Coherent (or
National) Regulation?

How We Got Here...



How We Got Here...



Historical Context: NCAA Prohibitions on Athlete Compensation

1948: “Sanity Code” passed by the NCAA

1956: NCAA loosens “Sanity Code” and allows scholarships to athletes based on athletic ability. **The scholarships were capped at "tuition and fees, room and board, and required course-related books."**



Historical Context: NCAA Prohibitions on Athlete Compensation




NCAA delivers postseason football ban

ESPN.com news services

Jun 10, 2010, 03:00 PM ET

Reggie Bush, Ineligible for '05, Returns Heisman

 Share full article



By **Bill Pennington**

Sept. 14, 2010

In an unprecedented move, Reggie Bush relinquished his 2005 Heisman Trophy on Tuesday, choosing to give back a singularly eminent award in American sport before most likely being stripped of it.

Former USC star Reggie Bush files defamation suit against NCAA, wants Heisman Trophy back



By **Cheri Mossburg**, CNN

⌚ 2 minute read · Published 8:12 PM EDT, Wed August 23, 2023

Historical Context: NCAA Prohibitions on Athlete Compensation

Reggie Bush could've made \$4 to \$6 million annually with NIL: Report

BY SAMEER KUMAR APRIL 26, 2023



Historical Context: NCAA Prohibitions on Athlete Compensation

- Pre-NIL Era:

“[S]tudent-athletes should not be commercially exploited. They are students, not professionals. Exploiting student-athletes for commercial purposes is as contrary to the collegiate model as paying them.”

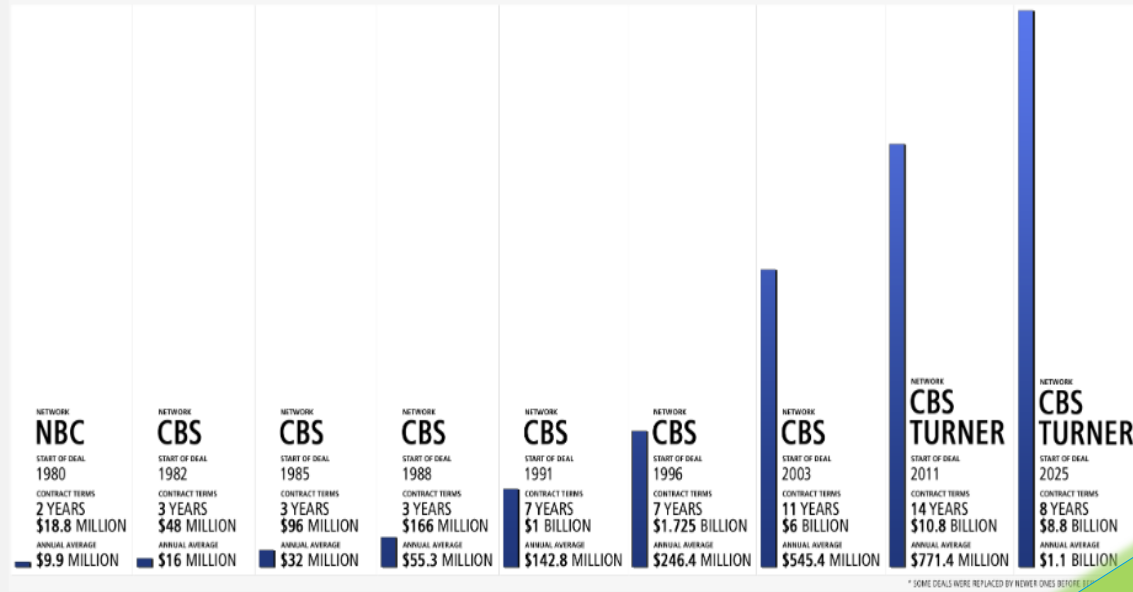
- Wallace I. Renfro, NCAA VP & Senior advisor to Myles Brand (2009)

Historical Context: NCAA Prohibitions on Athlete Compensation

- In 1984, the Supreme Court in *Board of Regents* held that the NCAA acted like a “classic cartel” in placing artificial limits on televised college football, and violated the Sherman Act
- This decision gave more power, and opened the door to more TV revenue, to the college conferences
- Interestingly, the Court’s opinion generally supported the proposition that the preservation of amateurism is a legitimate procompetitive purpose for the NCAA to pursue

Rise in Value of College Sports Rights

INCREASES IN NCAA BASKETBALL TOURNAMENT TV RIGHTS



SEC, Big Ten each top \$2 billion in athletic department revenue, outpacing Power Five foes

Power Five conferences brought in more than \$3.3 billion in 2022 with Big Ten, SEC leading the way

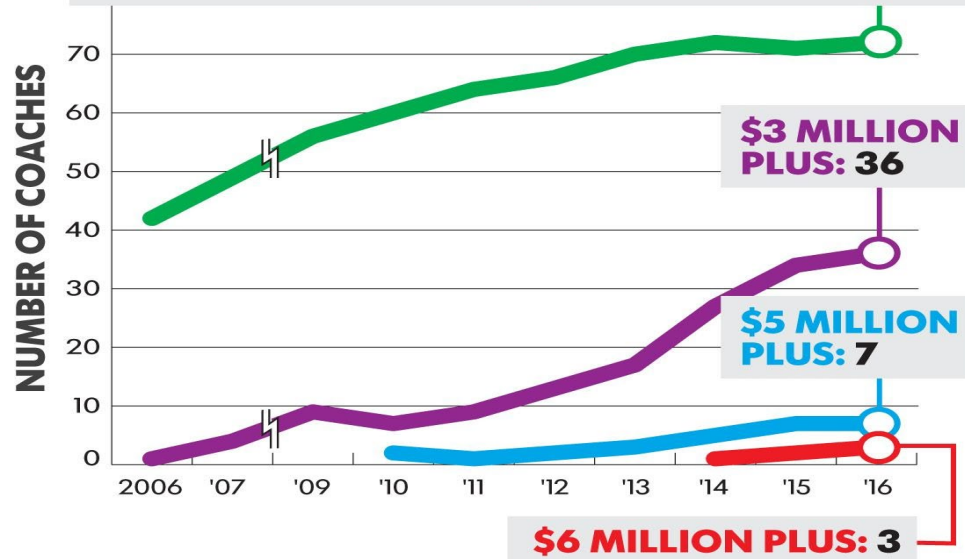
B1G deal: Big Ten lands \$7 billion, NFL-style TV contracts

Growth of Coaches Salaries and School/Conference Revenue

SALARY PROGRESSION IN COLLEGE FOOTBALL

USA TODAY
SPORTS

COACHES EARNING \$1 MILLION PLUS: 72



Note: USA TODAY did not conduct a college football coaches salary survey in 2008.

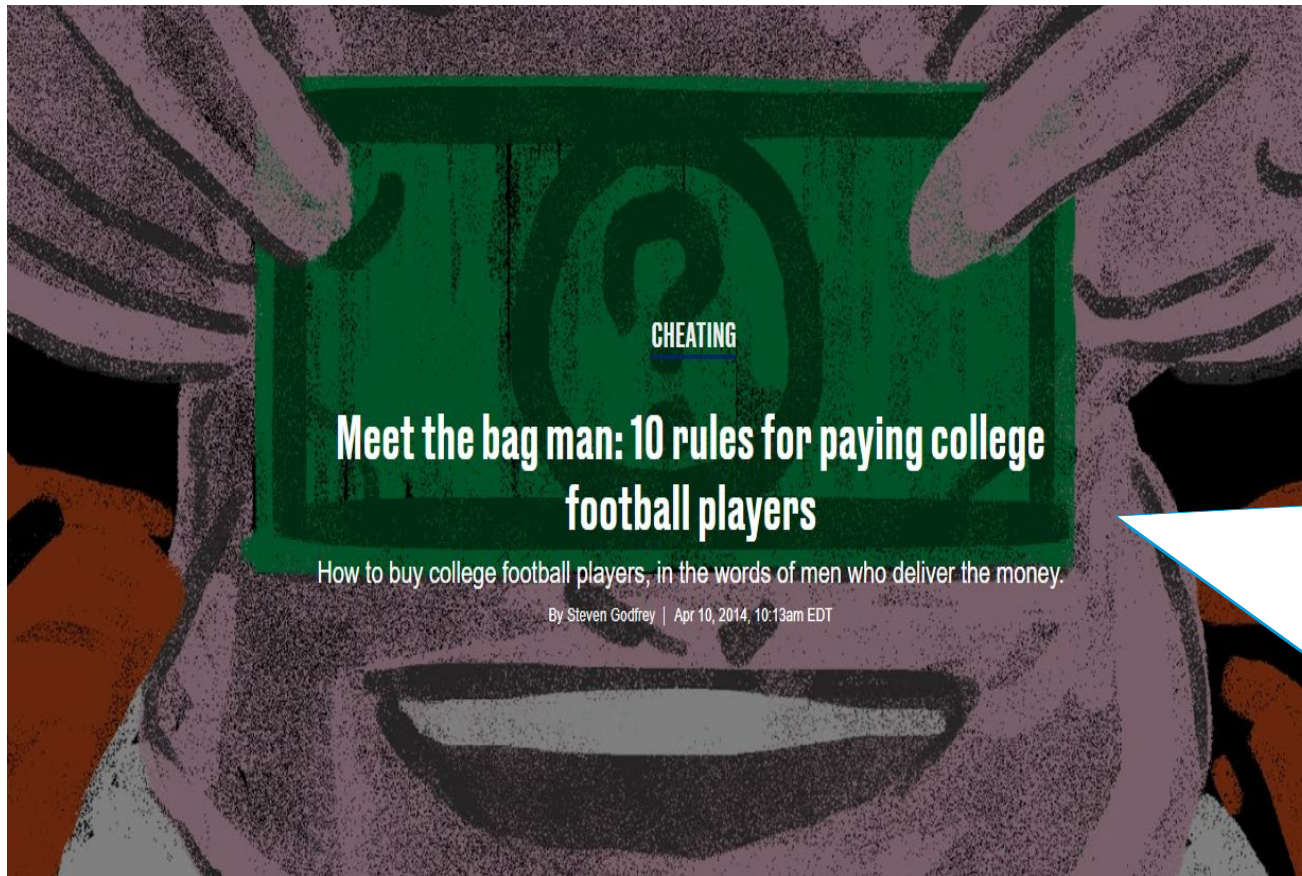
SOURCE USA TODAY Sports research

Why college football is king in coaching pay – even at blue blood basketball schools

USA TODAY Sports found that the public schools in the Power Five conferences will pay their head coaches an average of \$6.2 million this year – which marks a whopping 14.8% increase from 2022.

The Old Days of Student Athlete “Compensation”

[The new joke is...NIL means “Now it’s legal”]



“A good bag man will never be famous ... There are no memorial scholarships named after the guy who gave a running back’s mother \$3,000 a month for four years.”

The Legal Landscape and Start of the NIL Era

The O'Bannon Case Is Filed

O'Bannon v. NCAA, No. 09-3329 (N.D. Cal.)

Former Bruin O'Bannon sues NCAA

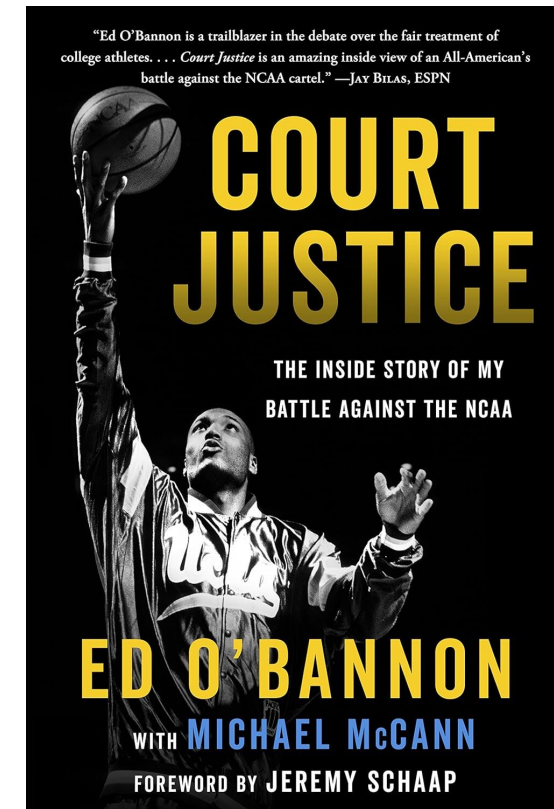
Associated Press

Jul 21, 2009, 07:32 PM ET

↑ Share

SAN FRANCISCO -- A former UCLA basketball player is suing the NCAA over its use of former student athletes' images in DVDs, video games, photographs, apparel and other material.

In a federal lawsuit filed Tuesday, Ed O'Bannon says the NCAA illegally has athletes sign away their rights to the commercial use of their images and does not share any of the proceeds from their use with former athletes.



The O'Bannon Case

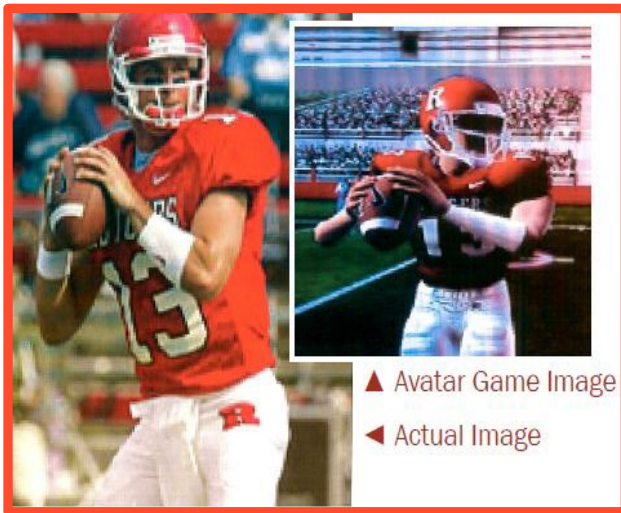
- Ed O'Bannon, learned that a college basketball video game featured an avatar that resembled him and sported his jersey number
 - The thrust of his complaint was that the NCAA illegally restrained trade, in violation of Section 1 of the Sherman Act, by preventing FBS football and D1 men's basketball players from receiving compensation for the use of their names, images, and likenesses
 - After a bench trial, applying the Rule of Reason, the district court agreed with O'Bannon and entered relief for the plaintiffs
- *O'Bannon v. NCAA (O'Bannon I)*, 7 F. Supp. 3d 955 (N.D. Cal. 2014)).

The O'Bannon Case

- The district court acknowledged that college athletics' "amateur tradition" helps maintain their popularity as a product distinct from professional sports, yet it nevertheless concluded that this pro-competitive benefit did not justify the NCAA's "sweeping prohibition" on NIL compensation
- After entering judgment for the plaintiffs, the district court permanently enjoined the NCAA from prohibiting its member schools from (1) compensating FBS football and Division I men's basketball players up to the **full cost of attendance** at their respective schools, or (2) paying up to \$5,000 per year in deferred compensation for the use of their NIL
- The NCAA appealed

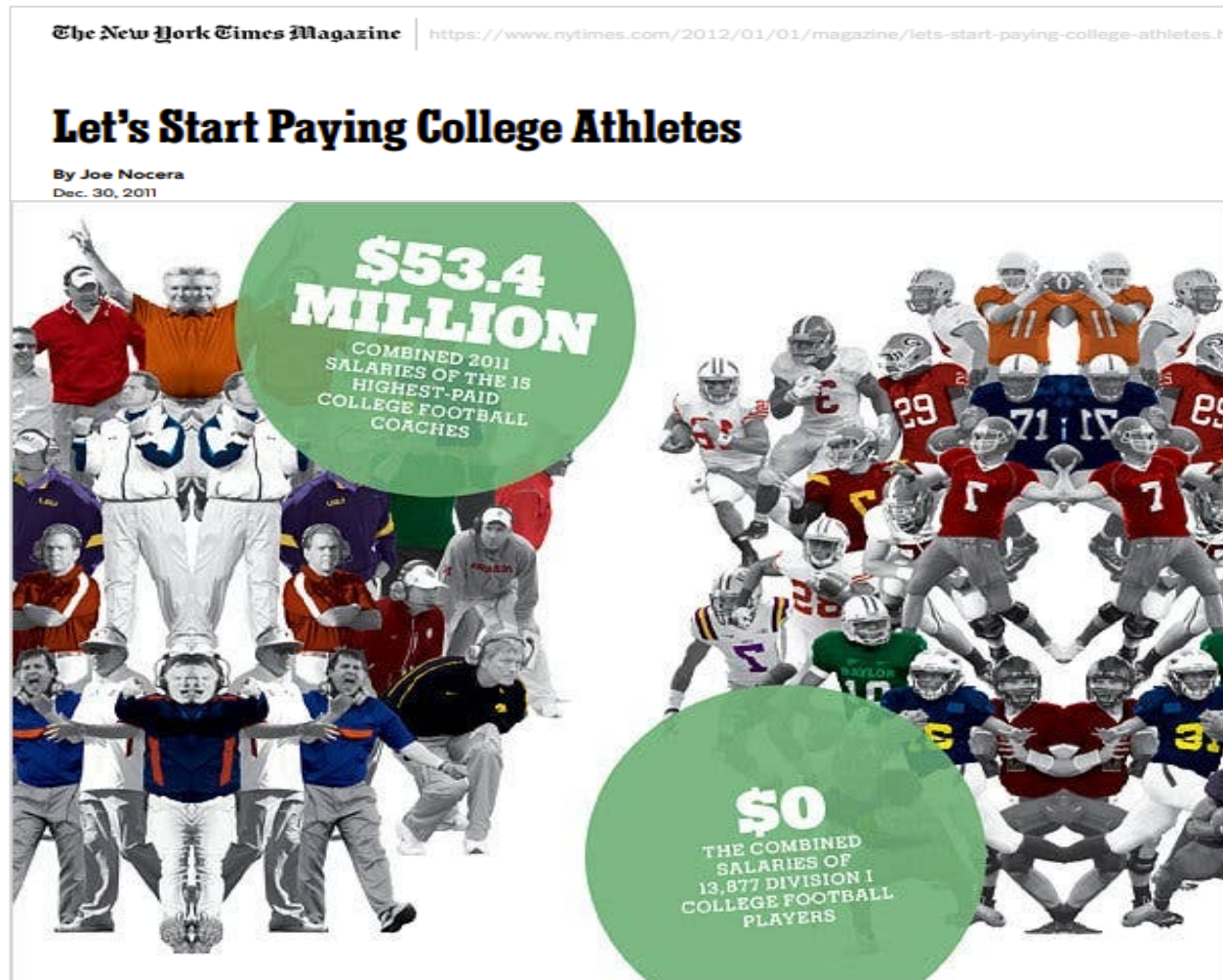
The Keller & Hart Cases

- *Keller v. Elec. Arts Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.)*, 724 F.3d 1268 (9th Cir. 2013)
- *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013)



- Video game publishers use of digital avatars that virtually replicated college football players' identities was not sufficiently transformative a use to merit First Amendment protection as a matter of law
- The games replicated, *inter alia* the players' face, skin tone, hair color; jerseys, numbers, biographical information, and playing style

Time to Pay College Athletes?



Public Sentiment and Student-Athlete Resentment Prompt Small Reforms

Shabazz Napier Says He Goes to Bed Starving Because He Can't Afford Food

JOSEPH ZUCKER 
APRIL 7, 2014



Ronald Martinez/Getty Images

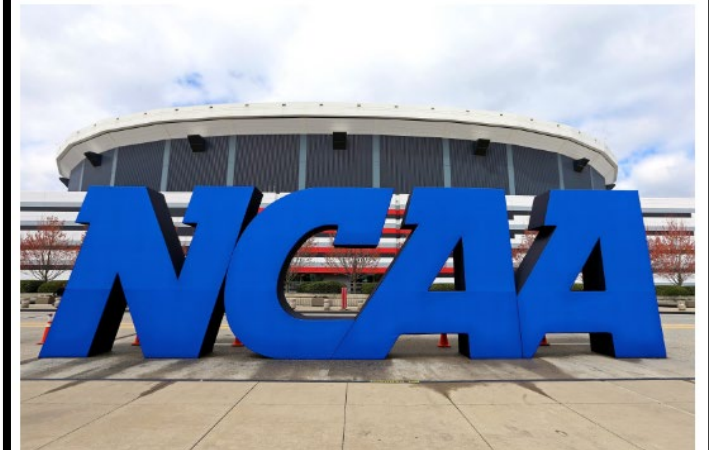
All the free gear and coaching lessons in the world can't help you when you're hungry. Shabazz Napier is one of the biggest stars on a college basketball team in the national championship game, yet he claims there have been nights where he's "starving" because he doesn't have money to buy food.

"He says he's going to bed hungry at a time when millions of dollars are being made off of him. It's obscene. This isn't a Connecticut problem. This is an NCAA problem, and I want to make sure we're putting pressure on them to treat athletes well."

- Connecticut Rep. Matthew Lesser commenting, and considering legislation about allowing U Conn athletes to unionize.

NCAA Approves Unlimited Meals and Snacks for Division I Student-Athletes

TYLER CONWAY 
APRIL 15, 2014



Getty Images

No Division I college athlete should ever go to bed "starving" again. Following a meeting of its Legislative Council on Tuesday, the NCAA announced the removal of meal and snack restrictions on Division I athletes.

O'Bannon v. NCAA on Appeal

O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015)

- The Ninth Circuit cited *Keller* and *Hart* and rejected the NCAA's argument that the First Amendment would preclude any right-of-publicity claim arising out of a sports video game
- A majority of a Ninth Circuit panel concluded that the district court's decision, the first of its kind, was "largely correct"
- The panel unanimously affirmed the lower court's injunction insofar as it required the NCAA to permit athletic scholarships for the full cost of attendance (COA), but a panel majority reversed and vacated the injunction's requirement that the NCAA allow deferred NIL payments



O'Bannon v. NCAA on Appeal

O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015)

- The panel rejected the NCAA's threshold argument that its amateurism rules, including those governing compensation, are "valid as a matter of law" under *NCAA v. Board of Regents* (1984)
- The panel acknowledged the Supreme Court's observation, in "dicta," that the NCAA has historically preserved its product by, *inter alia*, prohibiting payments to student-athletes
- But it declined to read that statement as perpetual blanket approval for the NCAA's compensation rules. Though conceding that the NCAA's "amateurism rules are likely to be procompetitive," the panel refused to exempt them from antitrust scrutiny



After O'Bannon

“A major outcome of the lawsuit is that NCAA member schools are able to give athletes the full cost of attendance, something the NCAA had resisted. That allows scholarship athletes to receive a monthly stipend check that can be for as much as \$500.

This is still not enough to cover living expenses and is insignificant when compared with the NCAA’s earnings from the men’s Division I tournament.”

The fight that Ed O'Bannon started with the NCAA isn't over yet

Division I athletes do get scholarships and supplemental cash, but more could be done



26 Mar 1995: UCLA FORWARD ED O'BANNON CELEBRATES BY CUTTING HIS PART OF THE NET AFTER THE BRUINS 102-96 WIN OVER UCONN IN THE NCAA WEST REGIONAL FINAL AT THE OAKLAND COLISEUM IN OAKLAND, CALIFORNIA.

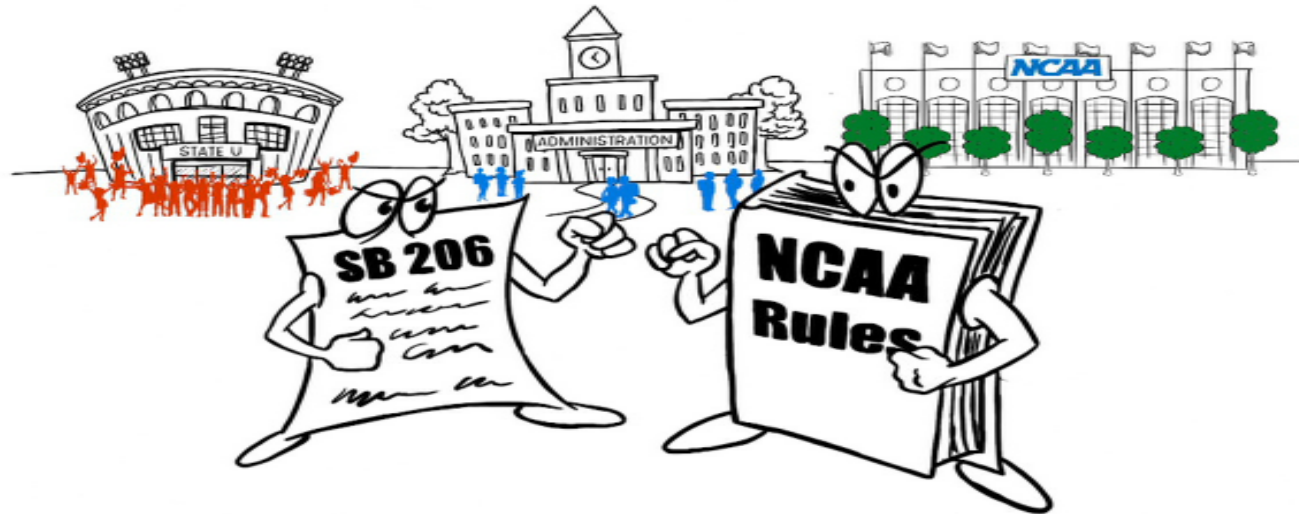


By William C. Rhoden @RhodenRhoden8

March 16, 2018

California First State to Pass College Athlete NIL Law

**California defies NCAA as Gov.
Gavin Newsom signs into law Fair
Pay to Play Act**



Dan Murphy, ESPN Staff Writer
Sep 30, 2019, 10:31 AM ET

California First State to Pass College Athlete NIL Law

- California law created a new NIL right under the law for California college athletes
- Other states soon followed
- Along with the *Alston* ruling, eventually compelled NCAA to approve NIL rules

What's Next After California Signs Game Changer Fair Pay to Play Act Into Law?

MICHAEL MCCANN • SEP 30, 2019

The *Alston* Case – Lower Court

In re National Collegiate Athletic Association Athletic Grant-In-Aid Cap Antitrust Litig.

NCAA can claim victory after losing federal antitrust case



FILE - In this March 21, 2013, file photo taken with a fisheye lens, the NCAA logo is displayed at mid-court before Albany's practice for a second-round game of the NCAA college basketball tournament in Philadelphia. A judge has ruled against the NCAA in a federal antitrust lawsuit, saying football and basketball players should be permitted to receive more compensation from schools but only if the benefits are tied to education. (AP Photo/Matt Slocum, File)

BY RALPH D. RUSSO

Published 12:05 AM EST, March 9, 2019

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“The court’s decision recognizes that **college sports should be played by student-athletes, not by paid professionals** ... The decision acknowledges that the popularity of college sports stems in part from the fact that these athletes are indeed **students, who must not be paid unlimited cash sums unrelated to education.**” - NCAA chief legal counsel Donald Remy

The *Alston* Case

NCAA v. Alston, 141 S. Ct. 2141 (2021)

- On appeal, the NCAA argued that something more deferential than the Rule of Reason should apply to its restrictions on student-athlete compensation because **the NCAA's amateurism restrictions advance the “societally important non-commercial objective of higher education”**
- In a unanimous ruling, the Supreme Court held that this argument — that the NCAA “should be exempt from the usual operation of the antitrust laws” — should be directed to Congress, not a court
- The court’s ruling made clear that favorable precedent that may have previously shielded the NCAA from antitrust laws surrounding student athletes had eroded

***Alston*: The Explosive Justice Kavanaugh Concurrence**

HOW BRETT KAVANAUGH SET THE WHEELS IN MOTION WITH ONE CONCURRING OPINION

“I add this concurring opinion to underscore that the NCAA's remaining compensation rules also raise serious questions under the antitrust laws”

“The NCAA couches its arguments for not paying student athletes in innocuous labels. But the labels cannot disguise the reality: The NCAA's business model would be flatly illegal in almost any other industry in America”

“The bottom line is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate *billions* of dollars in revenues for colleges every year. Those enormous sums of money flow to seemingly everyone except the student athletes”

NCAA Interim NIL Policy (Effective July 2021)

Media Center | 6/30/2021 4:20:00 PM | Michelle Brutlag Hosick

NCAA adopts interim name, image and likeness policy

Interim policy goes into effect Thursday



NCAA college athletes will have the opportunity to benefit from their name, image and likeness beginning Thursday. Governance bodies in all three divisions today adopted a uniform interim policy suspending NCAA name, image and likeness rules for all incoming and current student-athletes in all sports.

"This is an important day for college athletes since they all are now able to take advantage of name, image and likeness opportunities," NCAA President Mark Emmert said. "With the variety of state laws adopted across the country, we will continue to work with Congress to develop a solution that will provide clarity on a national level. The current environment – both legal and legislative – prevents us from providing a more permanent solution and the level of detail student-athletes deserve."

The policy provides the following guidance to college athletes, recruits, their families and member schools:

- Individuals can engage in NIL activities that are consistent with the law of the state where the school is located. Colleges and universities may be a resource for state law questions.
- College athletes who attend a school in a state without an NIL law can engage in this type of activity without violating NCAA rules related to name, image and likeness.

The NIL Era Begins

Report: Athletes Pocket \$917 Million in Year One of NIL

STEPHEN THOMPSON • JUL 13, 2022

\$1.17B YEAR 3 PROJECTED MARKET SPEND

LEVEL	FOOTBALL	MBB	WBB	OTHER
POWER 5	\$595.0M	\$212.5M	\$37.0M	\$58.5M
GROUP OF 5	\$83.8M	\$61.3M	\$17.6M	\$4.5M
NCAA DI	\$46.8M	\$28.6M	\$3.9M	\$10.1M
NCAA DII, DIII, NAIA, NJCAA	\$560.0K	\$563.7K	\$1.1M	\$2.5M
TOTAL	\$726.2M	\$303.0M	\$59.4M	\$76.5M

*Student-athletes in the corresponding subsections are projected to earn the cumulative amount indicated, based on anonymized transactions facilitated or disclosed through Opendorse between July 1, 2021, and June 5, 2023.

These 10 college athletes are making over \$1 million a year from NIL

Last Updated: Oct. 13, 2023 at 8:26 p.m. ET

First Published: Oct. 13, 2023 at 9:18 a.m. ET

By [Weston Blasi](#) [Follow](#)

The NCAA started allowing college athletes to make money from their name, image and likeness in 2021, and several students are already making millionaires

NIL Opportunities: The Conventional Ad



Iowa Pork Producers NIL Ads Go Viral...



NIL Opportunities – Local Business



NCAA Interim NIL Policy - FAQs

- The following is prohibited:
 - Pay-for-play
 - NIL compensation contingent upon enrollment
 - Compensation with no quid pro quo
 - Compensation for athletic participation or achievement
 - Institutions providing compensation in exchange for the use of NIL

Everyone

NCAA rules prohibiting pay-for-play and impermissible inducements remain in effect.

PAY-FOR-PLAY

**IMPERMISSIBLE
INDUCEMENTS**

NCAA NIL Policy – May 2022 Clarification on Third Party Involvement

- Guidance reminder: NCAA rules preclude boosters from engaging in recruiting activities, including recruiting conversations, on behalf of a school
 - Boosters may not provide benefits to prospective student athletes (PSAs)
 - Existing NCAA prohibitions related to pay-for-play have not changed
 - Collectives may not communicate with a PSA, a PSA's family, or others affiliated with the PSA for a recruiting purpose, or to encourage the PSA's enrollment at a particular institution
 - NIL agreements may not be guaranteed or promised contingent on initial or continuing enrollment at a particular institution
 - NIL agreements must be based on an independent analysis of the value that each athlete brings to an NIL agreement as opposed to providing compensation or incentives for enrollment decisions, athletic performance, achievement or membership on a team



The Booster 'Collectives' Putting Money in the Pockets of College Athletes

It isn't pay for play, but the newest phenomenon for shuttling money to athletes in college sports is being used as an indirect recruiting tool

NIL “Arms Race”



SPORTS COLLEGE FOOTBALL UTAH

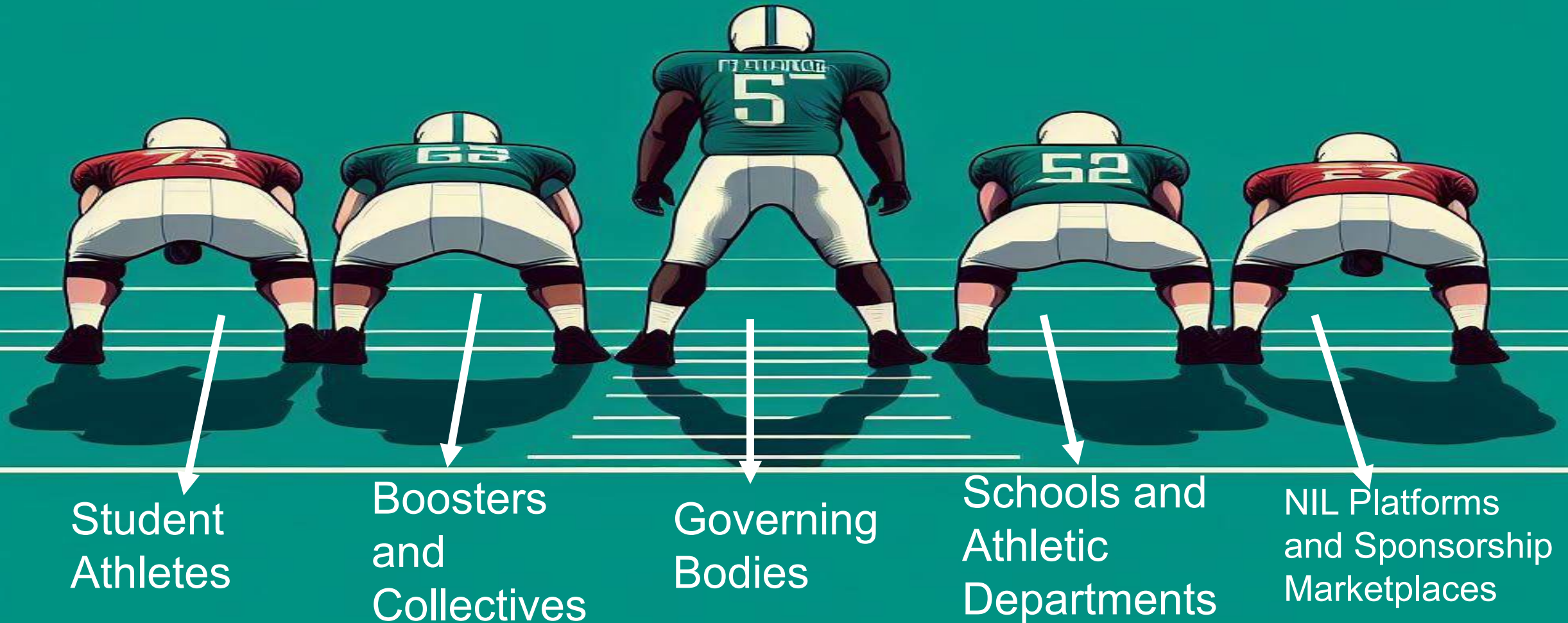
How NIL is transforming college sports

NIL has become an integral pillar but also a looming threat to the sport formally known as amateur college athletics

By Dennis Romboy | Oct 10, 2023, 11:00pm EDT

f X SHARE

The NIL Era: The Players



The NIL Era – New Opportunities for Boosters

‘There’s no rules. It’s crazy’: New money in NCAA recruiting leaves elite athletes ripe for exploitation

“If you make a mistake, it could cost you your whole college career,” said one top high school football player.



— A Supreme Court ruling last summer kicked off a new era of college sports that promises massive profits for star athletes. High schoolers with new earning potential find themselves navigating a confusing environment full of big promises and profiteering middlemen. Liza Evseeva / NBC News

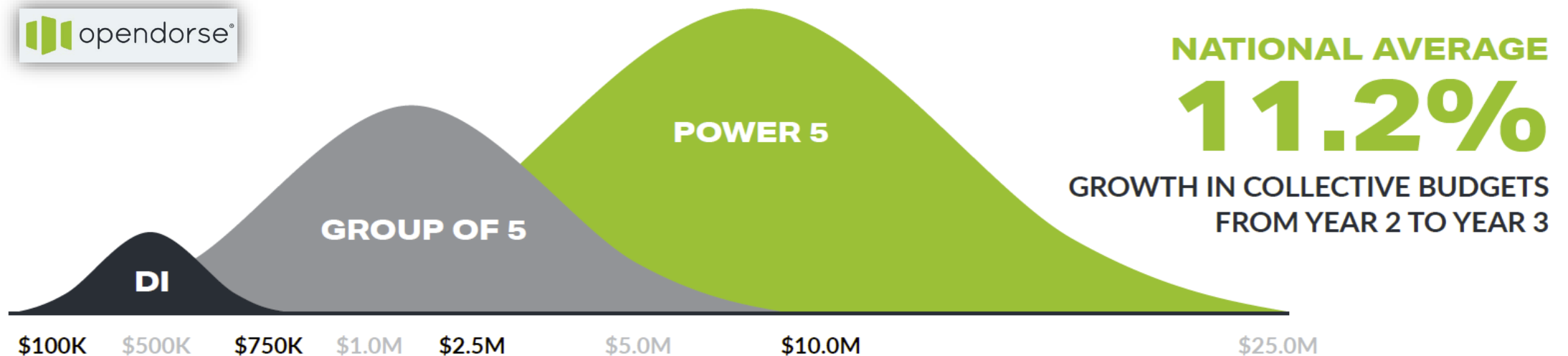
“Boosters are looking around and saying, ‘You told me I couldn’t give an athlete a bagel and cream cheese, and now I can give a million dollars? I’ll do 4 [million].’”

- Doug Fillis, Accelerate Sports Ventures

Collectives: Big Budgets for Some Division 1 Programs

WHAT IS A COMPETITIVE COLLECTIVE BUDGET?

Collectives come in all shapes and sizes – and each organization has its own goals, priorities, and limitations. The bell curves shown below illustrate where the budgets of each subdivision's collectives operate, with room for outliers.



*NIL collectives budget data is based on a blend of dollars committed for the 2023-24 academic year and anonymized transactions by Opendorse partner and non-Opendorse partner collectives facilitated or disclosed through Opendorse between July 1, 2021, and June 5, 2023.

According to Opendorse, collectives delivered 75% of NIL compensation to athletes.

Big Budgets: The New Reality of the Power 5 Conferences

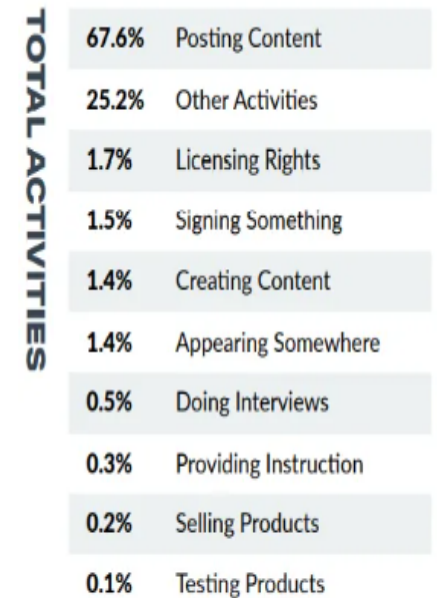
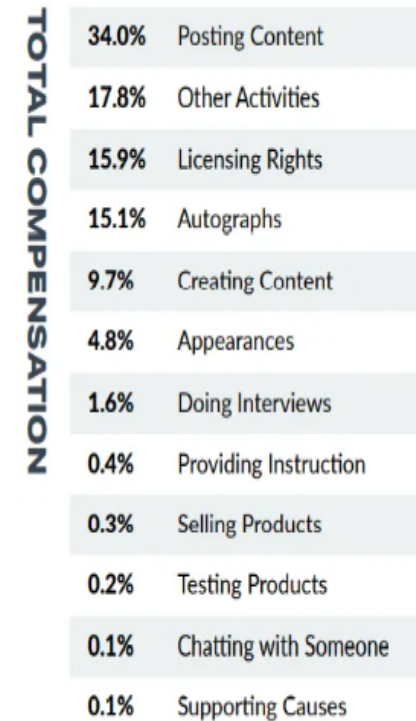
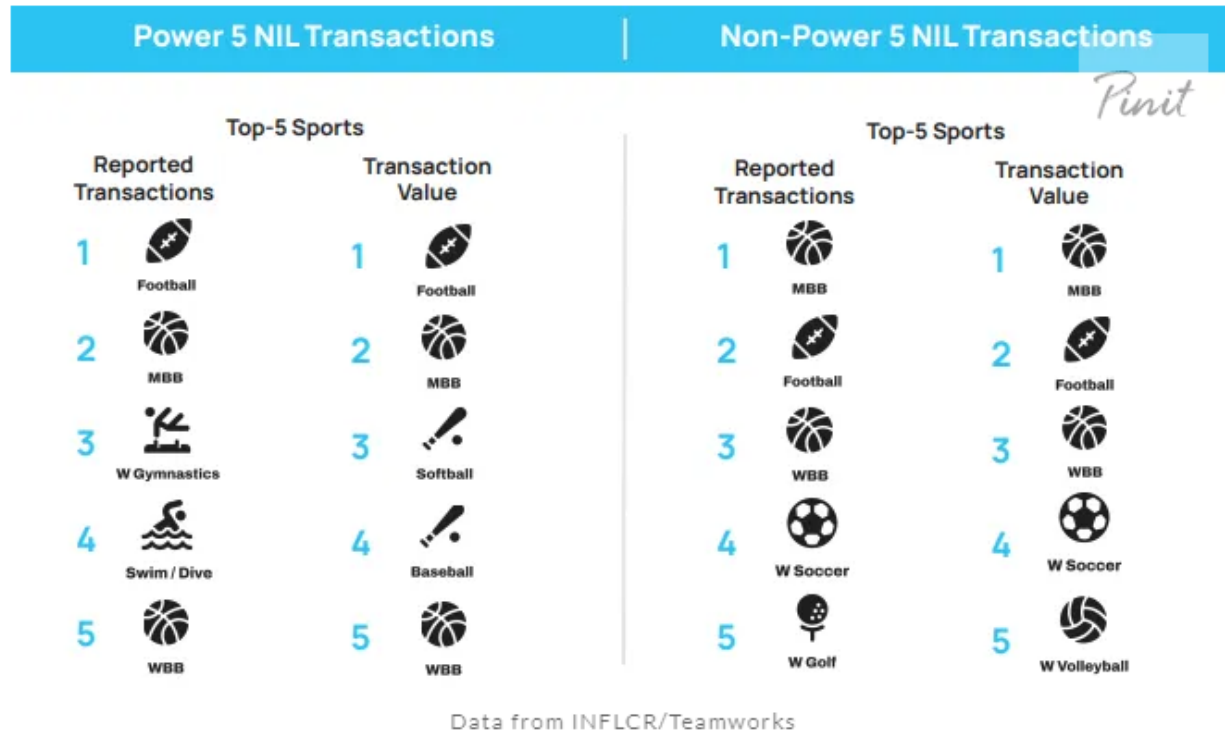
Nebraska's Matt Rhule: 'Good QB' Costs \$1-2M in NIL Deals in Transfer Portal

DORIC SAM

NOVEMBER 29, 2023



The NIL Era: Where Is the Money Going? And for What?



NIL Opportunities, Both Big Deals and Small

Deion Sanders' Son Shedeur Uses NIL Coin to Buy \$200K Maybach | WATCH

By Cherie Saunders July 23, 2023



Deion Sanders and his Son Shedeur film video in the latter's new Maybach bought with NIL earnings (Twitter screenshot)

***Deion Sanders** recently filmed a video of himself riding shotgun on a joy ride in his son **Shadeur**'s new Mercedes Maybach sedan, which has a starting price of \$200,000.

The Smaller, Everyday Deals for College Athletes Under New Rules

Although players with six-figure deals have attracted most of the public attention, thousands of athletes are pulling in just enough for books or date nights under name, image and likeness agreements.

[Share full article](#)



Emily O'Donnell, left, and Emelie Curtis, center, teammates on the Duquesne University lacrosse team, finish a lacrosse clinic in Pittsburgh. Jared Wickerham for The New York Times

NCAA NIL Policy – October 2022 Clarification on School Involvement

- Schools generally can provide education to current student-athletes (SA), including on topics like taxes and social media
- Schools can inform SA about potential NIL opportunities and can work with a collective to administer a "marketplace" that matches SA with those opportunities
- Schools cannot, however, engage in negotiations on behalf of an NIL entity or a SA to secure specific NIL opportunities
- Schools also can request donors provide funds to collectives and other NIL entities, provided the schools do not request that those funds be directed to a specific sport or SA

INSTITUTIONAL EDUCATION AND MONITORING

Permissible under Interim Policy/NCAA rules

- Educational sessions for SAs: Financial literacy, taxes, entrepreneurship, social media, etc.
- Educational sessions for NIL entity (e.g., Collectives).
- Educational sessions for boosters.
- Educational sessions for PSAs.
- Required reporting of NIL activity by SAs.

*No impermissible activities identified at this time; additional circumstances to be considered, as appropriate.

INSTITUTIONAL SUPPORT FOR STUDENT-ATHLETE NIL ACTIVITY

<i>Permissible under Interim Policy/NCAA Rules</i>	<i>Impermissible under Interim Policy/NCAA Rules</i>
<ul style="list-style-type: none">• Engage NIL entity to inform SAs of NIL opportunities.• Engage NIL entity to administer a marketplace that matches SAs with NIL opportunities without involvement of institution.• Provide information to SAs about opportunities that institution has become aware of (transmit information without further involvement).• Provide SA contact information and other directory information to NIL entity (e.g., Collectives and others seeking to engage SAs).• Provide stock, stored photo/video/graphics to a SA or NIL entity.• Introduce SA to representatives of NIL entity.• Arrange space for NIL entity and SA to meet on campus or in institution's facilities.• Promote SA's NIL activity, provided there is no value or cost to the institution (e.g., retweeting or liking a social media post).• Promote SA's NIL activity on paid platform provided SA or NIL entity is paying going rate for advertisement (e.g., NIL entity pays for advertisement on video board).• Purchase items related to a SA's NIL deal that are de minimis in value and for the same rate available for the general public.	<ul style="list-style-type: none">• Communicate with NIL entity regarding specific SA request/demand for compensation (e.g., SA needs X dollars in NIL money) or encouragement for NIL entity to fulfill SA's request.• Proactively assist in the development/creation, execution or implementation of a SA's NIL activity (e.g., develop product, develop promotional materials, ensure SA performance of contractual NIL activities) unless the same benefit is generally available to the institution's students.• Provide services (other than education) to support NIL activity (e.g., graphics designer, tax preparation, contract review, etc.) unless the same benefit is generally available to the institution's students.• Provide access to equipment to support NIL activity (e.g., cameras, graphics software, computers, etc.) unless the same benefit is generally available to the institution's students.• Allow SA to promote their NIL activity while on call for required athletically related activities (e.g., practice, pre- and postgame activities, celebrations on the court, press conferences).

NCAA (June 27, 2023) NIL Q&A

Question No. 1: It is clear that institutions may not compensate a student-athlete for use of NIL. Is it permissible for an entity closely associated with an institution to compensate student-athletes for use of their NIL?

Answer: No. Institutions may not use NIL transactions to compensate student-athletes for athletics participation or achievement or as an improper inducement. Any entity that is so closely aligned with an institution that it is viewed as an extension of the university is subject to the same NIL scrutiny as the institution

NCAA (June 27, 2023) NIL Q&A

Question No. 6: Some current and proposed state laws appear to now prohibit the NCAA from enforcing its rules. What is the NCAA's position on its approach when an institution in one of those states violates NCAA legislation?

Answer: NCAA rules are adopted by member schools. It is not fair to those schools who follow the rules to not enforce rules against those who choose not to do so. Schools who do not like the application of a particular rule should work through the NCAA governance process to change the rule. Unless and until the

NIL Q&A Conflicts with NCAA Interim Policy?

NAME | IMAGE | LIKENESS

Interim NIL Policy

- For institutions in states with NIL laws or executive actions with the force of law in effect, if an individual or member institution elects to engage in an NIL activity that is protected by law or executive order, the individual's eligibility for and/or the membership institution's full participation in NCAA athletics will not be impacted by application of NCAA Bylaws unless the state law is invalidated or rendered unenforceable by operation of law.

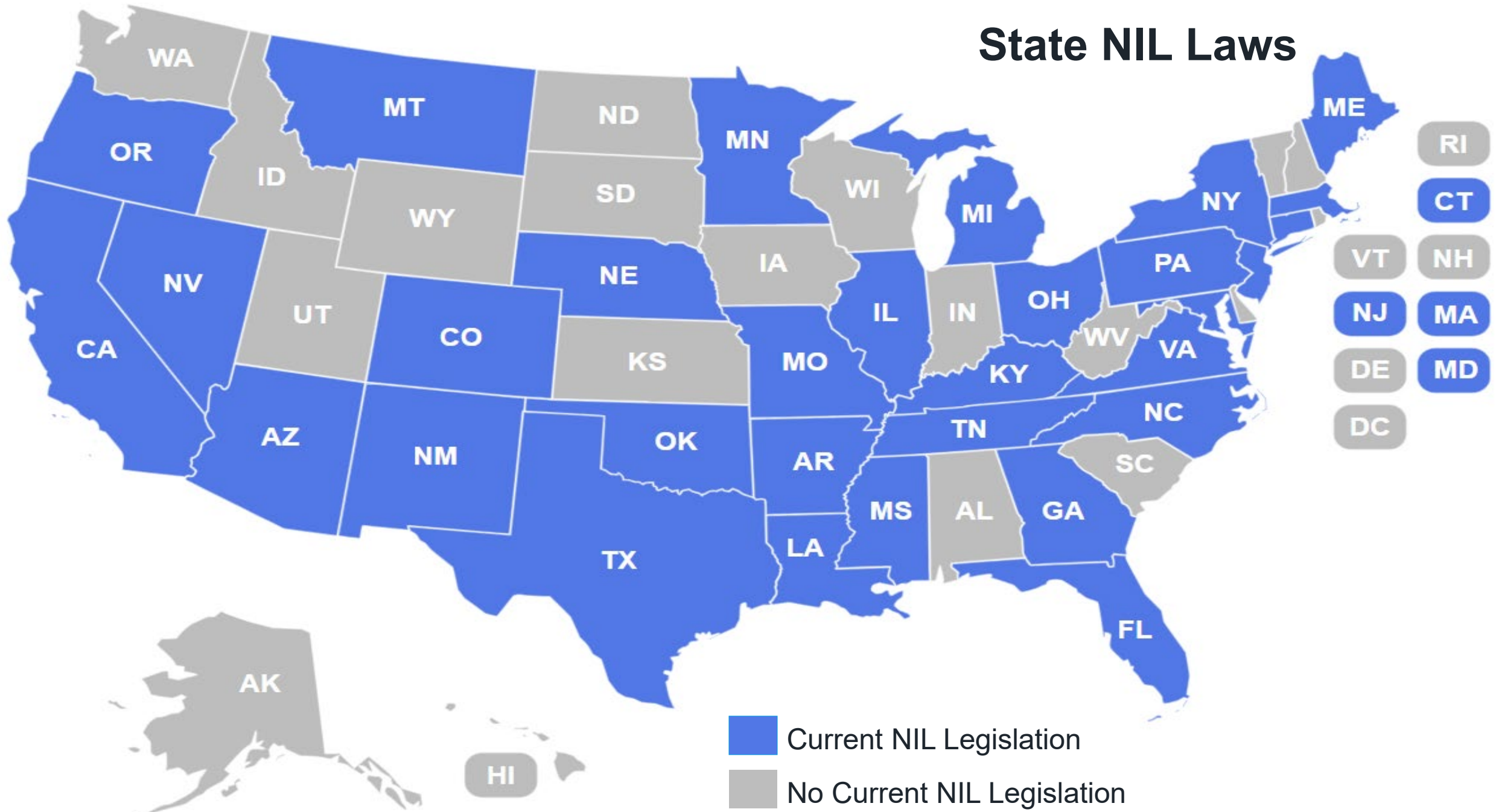
NCAA Warning to Schools

NCAA Releases NIL Memo, Warns Schools That Rules Supercede State Laws

MADISON WILLIAMS • JUN 27, 2023

The NCAA appears set to crack down on NIL violations for schools across the country after NCAA executive vice president of regulatory affairs Stan Wilcox sent a memo to schools on Tuesday stating that any school that violates NCAA rules, despite what its state laws allow, could be punished.

State NIL Laws



State Law Conflicts with NCAA NIL Policies

- Some state laws expressly prohibit the NCAA from bringing enforcement actions against schools that engage in any NIL activity protected by the state law even if such activity is prohibited under NCAA regulations
 - **NY Educ. Law § 6438-c: “[T]he NCAA shall not and shall not authorize its member institutions to ... (ii) entertain a complaint, open an investigation, or take any other adverse action against a college for engaging in any activity protected in this section or for involvement in a student-athlete's name, image, or likeness ..**

Conflicts with State Laws – June 2023 NCAA Memo

NCAA Says Schools Must Adhere to NIL Rules Regardless of Conflict with State Laws

ERIN WALSH
JUNE 27, 2023

“The Association has been clear and maintains that schools **must adhere to NCAA legislation (or policy)** when it **conflicts with permissive state laws**. In other words, if a state law permits certain institutional action and NCAA legislation prohibits the same action, institutions **must follow NCAA legislation.**”

Push For a National NIL Law

COLLEGES Proclaiming a grave threat to college sports, Charlie Baker takes push for national NIL policy to Congress

By Michael Silverman Globe Staff, Updated October 17, 2023, 5:18 p.m.



Joining NCAA president Charlie Baker (above) testifying on Tuesday were Big Ten commissioner Tony Petitti, Florida gymnast Trinity Thomas, executive director of the National College Players Association Damoni Rums, Group Collective executive director Walker Innes, and athletic director Bill Bolenstein/Saint

“We want to partner with Congress to curtail NIL inducements, prevent collectives from tampering with students and to prohibit bad actors from trying to serve as agents.”

Select NIL Federal Bills

Booker, Blumenthal, Moran Announce Bipartisan Discussion Draft of Legislation to Protect College Athletes' Health, Education, & Economic Rights

Legislation would establish national name, image, & likeness standards, provide medical care to injured athletes, & prioritize students' educational opportunities & wellbeing.

JULY 20, 2023

Sen. Cruz Releases Discussion Draft of Bill to Codify NIL Rights For Athletes, Provide Legal Certainty for College Athletics

August 2, 2023

Draft legislation draws support from key stakeholders at the NCAA, conferences, and universities

JULY 25, 2023

MANCHIN, TUBERVILLE INTRODUCE LEGISLATION TO ADDRESS NAME, IMAGE AND LIKENESS IN COLLEGE SPORTS

Rep. Carey Introduces Student Athlete Level Playing Field Act

May 24, 2023 [Press Release](#)

Bipartisan Legislation to create one federal standard for Name, Image, Likeness (NIL) in college sports

Murphy, Trahan Reintroduce Legislation to Codify College Athletes' Unrestricted Right to their Name, Image, Likeness

July 26, 2023

Post-*Alston* Litigation against the NCAA

Student-Athletes As Employees? Back Payments? Revenue Sharing?

- **Johnson v. NCAA**, 556 F. Supp. 3d 491 (E.D. Pa. 2021) (arguing that amateurism defense was abrogated by the Supreme Court’s decision in *Alston* and athletes should be deemed **employees** and paid accordingly for their time, under the FLSA; court denied motion to dismiss), *on appeal*, No. 22-1223 (3d. Cir) (oral arguments in Feb. 2023)
- **Fontenot v. NCAA**, No. 23-03076 (D. Colo. Filed Nov. 20, 2023) (putative antitrust class action brought by student athletes seeking a share of TV revenue “commensurate with the true value of their labor”; claims the NCAA’s rules and Conferences’ refusal to share such revenue is a “horizontal agreement” to “suppress prices”)

Post-*Alston* Litigation against the NCAA

Back Payments? Revenue Sharing?

- **In re College Athlete NIL Litig.**, No. 20-03919 (N.D. Cal. Sept. 23, 2023)
 - Certifying injunctive classes of athletes that played football, and M/W basketball and other sports; antitrust suit seeks relief to recapture lost NIL opportunities and bar NCAA and certain conferences rules that only allow third parties to pay NIL compensation to athletes, but bars schools and NCAA from paying student-athletes directly or entering into revenue sharing with conferences or schools.

NCAA Faces Billions In Damages As Judge Forges NIL Class

By Alex Lawson

Law360 (November 5, 2023, 12:22 PM EST) -- Athletes challenging NCAA restrictions on their name, image and likeness rights scored a huge procedural victory Friday as a California judge certified three classes that could put college athletics' governing body on the hook for billions of dollars in damages.

Post-*Alston* Litigation against the NCAA

Back Payments? Revenue Sharing?

NCAA, Power 5 Conferences Challenge Latest Ruling in House NIL Case

NOVEMBER 21, 2023 | 08:30 AM | BY AMANDA CHRISTOVICH

- The NCAA and Power 5 conferences are appealing a decision in an NIL case that puts them on the hook for \$4 billion in damages.
- The filing is an attempt to preserve amateurism and avoid lethal financial consequences.

“Denial of this petition would be the death knell of this litigation,” the petition ominously warns.

A background image of a large stadium at night, filled with spectators. The stadium is illuminated by numerous bright, glowing lights that create a hazy, atmospheric effect. The lights are concentrated in the center and along the sides of the stadium, casting a warm, golden glow. The sky above the stadium is a mix of light blue and white, suggesting a clear night.

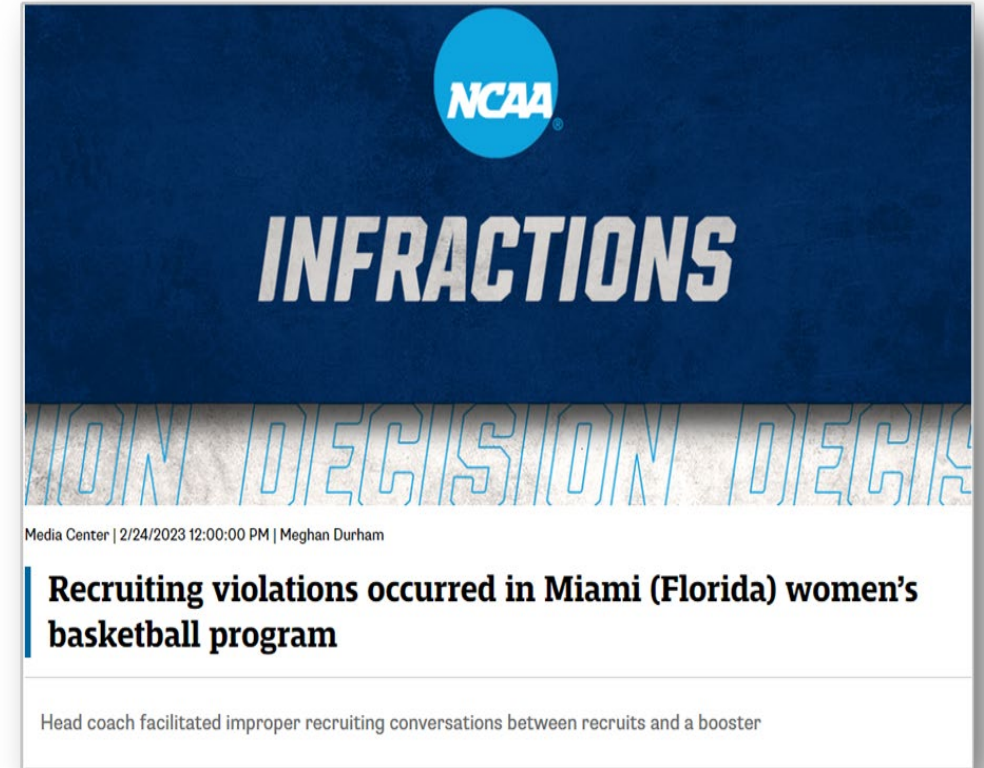
Compliance Issues

NCAA Policy: Burden of Proof – Change in Bylaws

- Bylaw 19.7.3: **“In cases involving name, image and likeness offers, agreements and/or activities in which related communications and conduct are subject to NCAA regulation, the infractions process shall presume a violation occurred if circumstantial information suggests that one or more parties engaged in impermissible conduct. The enforcement staff may make a formal allegation based on the presumption. The hearing panel shall conclude a violation occurred unless the institution or involved individual clearly demonstrates with credible and sufficient information that all communications and conduct surrounding the name, image and likeness activity complied with NCAA legislation.”**
- Change went into effect January 1, 2023.

NCAA First (And, to Date, Only) NIL Enforcement

- **Feb. 2023:** Univ. Miami women's basketball coach Katie Meier re: booster involvement in recruiting of Cavinder twins from the transfer portal
- **NCAA:** "The head coach's involvement in arranging contact between the prospects and a booster violated NCAA recruiting rules. Boosters are not authorized recruiters and cannot have in-person, off-campus contact with prospects, and when the prospects visited the booster's home, it violated recruiting rules"
- Well-known booster was not disassociated from the basketball program



Postscript: Cavinder Twins



Cavinder Twins, Stars On
TikTok And Basketball Court,
Are Nearing \$2 Million In NIL
Deals, With More Ahead

Jul 1, 2022, 06:30am EDT

NIL Era – Biggest Loophole Are Inducements



- **Principal prohibition:** No pay-for-play and improper inducements tied to choosing to attend a particular school

“To avoid the N.C.A.A. prohibition against directly paying athletic recruits, many schools funnel money to recruits under the guise of a supposed third-party licensing deal — regardless of whether a player’s name, image and likeness have any market value whatsoever. We must establish and enforce regulations that allow legitimate transactions while barring those that are recruiting enticements or pay-for-play.”

- By John I. Jenkins (Notre Dame President) and Jack Swarbrick (Notre Dame Director of Athletics)

Compliance - Collectives

- **Rule #1: Avoid “Pay-to-Play” or other Recruiting Inducements**


- It is not advisable to promote a collective’s activities as related to recruitment

Sun Angel Collective (Arizona State): Stating to a news outlet that one of its goals for its donor money in August 2022 was for “**attracting top talent**”

Classic City Collective (Univ of Georgia): “Classic City Collective aims to be the nation’s foremost **supporter-funded NIL facilitation platform to position Georgia Athletics and athletes from all 21 sports for sustained success**”

Compliance – Collectives

Name, Image, and Likeness, and the Future of College Sports



U.S. SENATE COMMITTEE ON THE
JUDICIARY

00:00:00 03:17:09

WATCH VIDEO

Full Committee Hearing

Date: Tuesday, October 17th, 2023

Time: 10:00am

Location: Hart Senate Office Building Room 216

Presiding: Senator Blumenthal

Testimony: Tony Petitti, Big Ten Commissioner

- “One of the biggest challenges facing institutions and athletic departments today is the ability to identify *true* NIL deals from “pay-for-play” or inducement schemes, particularly with the precipitous rise of collectives.”
- “As collectives become more influential, we are concerned that operational control of college athletics is shifting away from institutions to collectives. [...] However, we do not support such activity when it is tied to a “pay-for-play” scheme disguised as NIL.”

Compliance - Collectives

Name, Image, and Likeness, and the Future of College Sports



Full Committee Hearing

Date: Tuesday, October 17th, 2023

Time: 10:00am

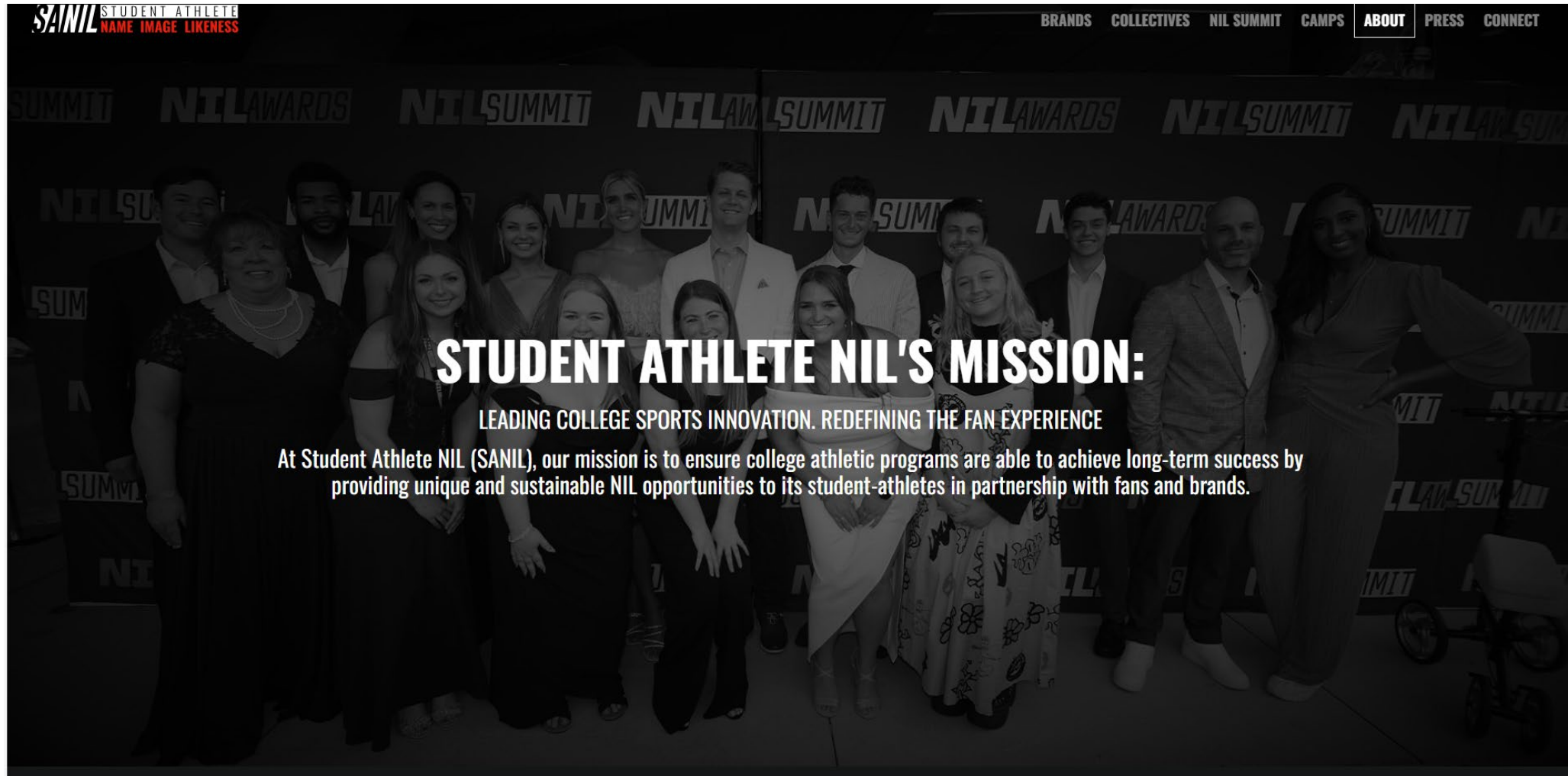
Location: Hart Senate Office Building Room 216

Presiding: Senator Blumenthal

Testimony: Walker Jones, Executive Director, The Grove Collective

- “... the overwhelming majority of commerce with name, image and likeness (NIL) is positive.”
- “We do not want to participate in the recruiting process and desire to only work with athletes once they have decided to attend school. I want to be clear that we have NO interest in being part of the active recruiting process.”
- “We are not shadow organizations run by out-of-control boosters and donors. Most collectives operate as full-time businesses with infrastructure, staff, and transparency with our universities and constituents.”

Compliance – Student Athletes



SANIL STUDENT ATHLETE
NAME IMAGE LIKENESS

BRANDS COLLECTIVES NIL SUMMIT CAMPS ABOUT PRESS CONNECT

STUDENT ATHLETE NIL'S MISSION:
LEADING COLLEGE SPORTS INNOVATION. REDEFINING THE FAN EXPERIENCE

At Student Athlete NIL (SANIL), our mission is to ensure college athletic programs are able to achieve long-term success by providing unique and sustainable NIL opportunities to its student-athletes in partnership with fans and brands.

Compliance – Student-Athletes

- Many student-athletes have little to no experience with the legal and financial issues behind a NIL deal
- Some state laws (e.g., Florida) require schools to provide financial literacy workshops
- Some state laws require athletes to disclose NIL deals to their school (and also that such contracts cannot conflict with the schools' existing contracts or policies)

Don't Forget to Pay Your Taxes!

College Athletes Who Cashed In Have a Painful New Homework Assignment: Their Taxes

With their newfound ability to profit from endorsement deals, college athletes are on the hook to file taxes on their earnings



Compliance - Intellectual Property Issues

- Some state NIL laws prohibit the student athlete from using school IP and logos without permission or enter into deals that may conflict with university contracts
- Students and marketers can ask permission, or a university and students might sign group licensing deals that allows certain uses of university trademark in NIL deals
 - Often marketers want to feature the athlete in their official school uniform
- What about ads that use generic uniforms matching the school's known color scheme?



Compliance - Title IX

- **Title IX:** Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." *20 U.S.C. § 1681(a)*
- **Issue:** If, at some point, schools and athletic departments become intimately involved in NIL negotiations or arranging NIL opportunities, could such involvement lead to a potential Title IX violation if such involvement is not administered consistently with respect to female athletes?
- **Inequality of NIL deals:** *New York Times* reports: "At top schools, the average men's basketball player with a collective contract is paid \$37,000, and the average women's player \$9,000, according to Opendorse."

Compliance - Title IX



THE DRAKE GROUP

Advancing Positive Legislative Change
In College Athletics



January 10, 2023

TO:

Ambassador Susan E. Rice
Director, Domestic Policy Council
1600 Pennsylvania Ave NW
Washington, DC 20500

Dr. Miguel Cardona
Secretary of Education Office for Civil Rights
400 Maryland Avenue, SW
Washington, DC 20202
ocr@ed.gov

Catherine Lhamon, J.D.
Assistant Secretary for Civil Rights
400 Maryland Avenue, SW
Washington, D.C. 20202 - 1100
Catherine.Lhamon@ed.gov

Suzanne B. Goldberg, J.D.
Deputy Assistant Secretary for Strategic
Operations and Outreach
Office for Civil Rights
U.S. Department of Education
400 Maryland Avenue, SW
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Suzanne.goldberg@ed.gov

FROM: Andrew Zimbalist, Ph.D.
President, The Drake Group
65 Ward Avenue
Northampton, MA 01069
(413) 320-1810

RE: REQUEST FOR ISSUANCE OF TITLE IX ATHLETICS GUIDANCE APPLYING EXISTING OBLIGATIONS IN THE NEW COMMERCIALIZED ARENA OF INTERCOLLEGIATE ATHLETICS INCLUDING REITERATION OF GUIDANCE RELATING TO PROMOTION, PUBLICITY, FINANCIAL AID AND RECRUITING INEQUITIES

College athletics are in a gigantic state of disruption, with athletes receiving substantial compensation that was unavailable a year or two ago. This disruption has been caused by state


“We do not write to suggest that OCR stem this flow of cash to college athletes, but rather to alert OCR that this cash is, with the blessing and/or cooperation of the 1000+ universities in the NCAA, flowing predominantly to men.”

Compliance - Title IX


Sportico Menu READ NEXT: Adidas' X/Twitter Calls Kevin... Account

HOME / LEAGUES / COLLEGE SPORTS


OREGON TITLE IX LAWSUIT PUTS NIL COLLECTIVES IN CROSSHAIRS

 **BY DANIEL LIBIT** December 1, 2023 1:00pm

[f](#) [t](#) [r](#) [p](#) [+](#)



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NIL-Related Litigation

NIL Litigation

Gervon Dexter sues to nullify NIL deal at Florida

The Bears' rookie defensive tackle owes Big League Advance Fund 15% of his pre-tax NFL earnings in exchange for \$436,485 he received from the company last year. But the lawsuit argues the contract he signed violated Florida's NIL Statute.

By Mark Potash | Sept 2, 2023, 4:03pm EST

    SHARE



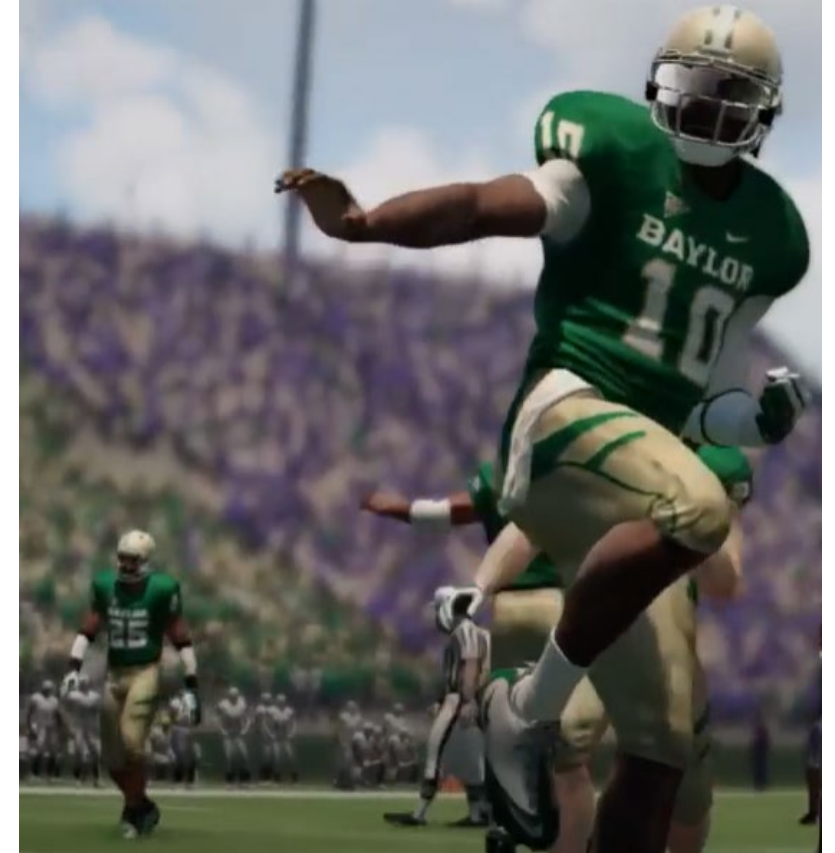
“The duration of a contract for representation of an intercollegiate athlete or compensation for the use of an intercollegiate athlete’s name, image or likeness may not extend beyond her or his participation in an athletic program at a postsecondary educational institution.”

NIL Litigation

Dexter v. Big League Advance Fund II LLP, No. 23-00228 (N.D. Fla. Notice of Voluntary Dismissal Nov. 14, 2023)

- **BLA:** “Now that Mr. Dexter beat the odds and made it to the NFL, however, he no longer wants to pay the BLA Fund any portion of his salary and seeks to disavow his agreement with the BLA Fund.”
- **BLA:** “[T]he agreement Mr. Dexter is trying to get out of contains a mandatory arbitration provision requiring that all claims relating the agreement and his relationship with the BLA Fund be resolved in arbitration.”
 - The arbitration provision stated that: “All claims arising out of or relating to th[e] Agreement (including their formation, performance, and breach), the Parties’ relationship with each other shall be finally settled by binding arbitration.”
- **Oct. – Nov. 2023:** Defendant moves to compel arbitration; Dexter drops suit


Electronic Arts, *NCAA Football* Game Published from 1993-2013



Electronic Arts, *NCAA Football* Some Backstory

- Consolidated action of former *and* current college athletes sued video game maker Electronic Arts, the NCAA, and the Collegiate Licensing Company (CLC) for right of publicity, among other claims
- **July 2013:** Ninth Circuit affirmed denial of dismissal, holding that defendants had no First Amendment defense against the right of publicity claims
- **Sept. 2013:** Suit is settled
- EA Sports eventually places the college football videogame series on hiatus over uncertainties over NIL licensing at the time

E.A. Sports and Collegiate Licensing to Pay \$40 Million to Compensate Athletes

 Share full article



By [Steve Eder](#)

Sept. 27, 2013

E.A. Sports and Collegiate Licensing Company are set to pay \$40 million to settle their roles in a high-profile lawsuit seeking compensation for college athletes.

The parties in the case notified the United States District Court in Northern California on Thursday that they had come to an agreement, but the terms were not disclosed and needed the approval of the judge.

College Football Videogame Is Coming Back

- **Feb. 2021:** EA Sports announced that it would be releasing a new college football game—titled EA Sports College Football—and that it would license schools' IP for use in the game through the Collegiate Licensing Company ("CLC"), the schools' exclusive licensing agent
- **June 2021:** Post-Alston, EA announced that it would explore the possibility of licensing NIL for use in the game

Electronic Arts & CLC to Bring Back College Football Video Games

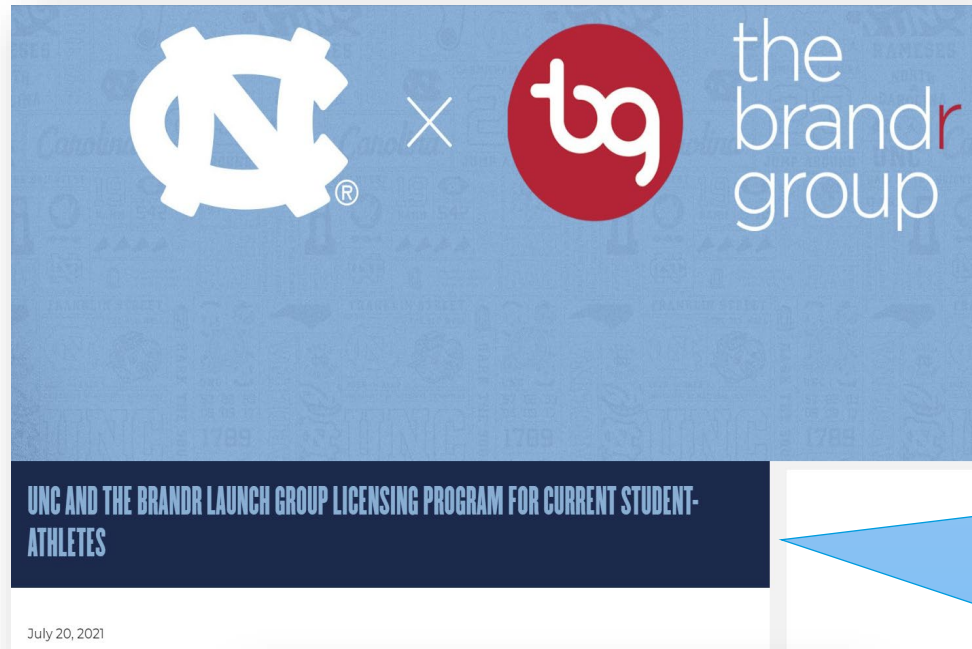
FEBRUARY 2, 2021

EA SPORTS Begins Development of Exclusive New College Football Console Experience

REDWOOD CITY, Calif. & ATLANTA--(BUSINESS WIRE)-- Today, Electronic Arts Inc. (NASDAQ: EA), a worldwide leader in interactive entertainment and sports gaming, and CLC, the nation's leading collegiate trademark licensing company, announced the expected return of college football to EA SPORTS™. The partnership allows for EA SPORTS to be the exclusive developer of simulation college football video game experiences. Development of EA SPORTS College Football is just underway, with launch timing still to come as the project progresses in the years ahead.



The Brandr Group, LLC v. Electronic Arts Inc., No. 23-02994 (N.D. Cal. Amended Complaint Filed Aug. 15, 2023)



“EA’s motivation...is clear: to cut TBG out of negotiations for the use of student-athletes’ names, images, and likenesses (“NIL”) in its EA Sports College Football videogame”



***The Brandr Group, LLC v. Electronic Arts Inc.*, No. 23-02994 (N.D. Cal. Order Denying Application for TRO June 30, 2023)**

- **June 2023:** Court denied plaintiff's request for a TRO to enjoin EA from soliciting plaintiff's clients for the videogame or otherwise interfering with plaintiff's contractual rights under its group licensing agreements
 - Brandr failed to show irreparable harm that wouldn't be compensable by money or any evidence that the value of students' NIL would be diminished by their use in the EA game
 - In addition, the Court found Brandr had not established it actually had an exclusive right to either the schools' IP or the students' NIL noting that the sample agreement submitted by Brandr was express that it **“does not restrict or prevent any of [a student's] existing or future, individual NIL agreements”**
 - At most, plaintiff identified a loss of the lucrative opportunity to be involved in the student's NIL licensing and the schools' IP licensing for the EA videogame

NIL Litigation

***The Brandr Group, LLC v. Electronic Arts Inc.*, No. 23-02994 (N.D. Cal. Motion to Dismiss Filed Aug. 22, 2023)**

EA Sports: “Brandr’s allegations of broad exclusivity contradict the plain language of the contracts Brandr attached to its Complaint”

- Student-athletes at all times retain the right to license their NIL individually
- At most, schools agree only to work with Brandr to “develop, implement or manage” a group licensing program that bundles the rights of multiple student-athletes with the schools’ IP

Put another way, Brandr could be involved in negotiations *only* when a school seeks to create a group licensing program that bundles the NIL of a group of student-athletes *together with* a school’s IP into a *single* license. But as the Complaint concedes, EA has no intent of pursuing a group licensing program

NIL Litigation

The Brandr Group, LLC v. Electronic Arts Inc.

The Brandr Group withdraws lawsuit against EA Sports, paves way for summer 2024 video-game release



By Chris Vannini Nov 30, 2023

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EA Sports: “We’ve been clear from the beginning that this suit had no merit. **Our focus continues to be on directly licensing individual college athlete name and likeness rights through an opt-in program** that will give college athletes the choice if they want to be in our game. [We] look forward to delivering EA SPORTS College Football in Summer 2024.”

Brandr: “While Brandr remains confident in its position in the litigation and the enforceability of group licensing rights, **Brandr has decided that it is in its best interest, and the best interest of its student-athletes, to stand down and monitor the progress of NCAA Football before determining whether further legal action is needed to protect its clients.**”

Final Thoughts

The NIL Era: Pluses and Minuses

- More economic freedom for student athletes, including those athletes that come from more modest backgrounds
- More opportunities for student athletes of all types to build their brands and learn business acumen
- Brings some formerly underground payments to athletes to light under state laws and NCAA regulations
- More abilities for students to connect with non-profits or advocate for causes
- May incentivize certain athletes to remain in college, given the financial benefits

- Challenging for schools to distinguish between legitimate NIL deals and “pay-to-play”, which remains prohibited by the NCAA
- NIL has led to an “arms race” in college sports and the new system creates an environment where the competitive balance shifts to those schools with the biggest donors
- To date, there has been an imbalance of NIL value. Title IX has not yet been applied and stats show male SAs and teams are receiving more NIL dollars than female SAs
- Potential Athlete Exploitation
- Erosion of “amateurism” in college sports.
- Conflicting state laws, changing NCAA policies and guidance and no national standard

Looking Ahead:

The Push-Pull of Amateurism vs. Compensation in College Sports

Is the current NIL system, loosely regulated by the NCAA and states, sustainable?

- Will ongoing lawsuits against the NCAA push further changes or remove more NCAA restrictions?
- Will Congress step in to provide a national college NIL standard?
- Will conferences share media revenue with student-athletes? Will the outcome of litigation compel this change? If so, how would the negotiation of media distribution rights be affected?
- Will athletes be deemed “employees” and form players’ unions akin to professional sports? Will such unions negotiate with conferences? Will athletes be part of collective bargaining with the NCAA to shape policies to create a more competitive environment?

The Next Frontier? Revenue Sharing



Breaking News: A New College Athletics Subdivision

COLLEGES

NCAA proposing new college athletics subdivision with direct athlete compensation

12.5.2023



NCAA President Charlie Baker is planning to introduce this week "a proposal to create a new subdivision within Division I that grants certain schools more autonomy around policy-making and permits them to compensate athletes in a new and profound way," according to Ross Dellenger of YAHOO SPORTS. In a letter sent to Division I members, Baker outlines a "groundbreaking and radical change" to the NCAA Division I athletics model, describing it as a "new forward-looking framework." According to Baker's proposal, schools that choose to be part of the new subdivision -- they can opt in or out -- are "required to meet a strict minimum standard rooted in athlete investment." Members of the new subdivision "will be permitted to strike" NIL deals with their own athletes -- "a significant change from the current structure." However, the most impactful benefit of this new model is "a framework that allows schools to directly compensate athletes through a trust fund." Schools within the new subdivision will be required to distribute to athletes thousands of dollars in additional educationally related funds without limitation." There is "no cap" on the amount of funds that a program can provide an athlete. Dellenger notes Baker's proposal is "perhaps the single-most revolutionary concept introduced by a sitting NCAA leader in college athletics history" ([YAHOO SPORTS, 12/5](#)).

HOW IT WILL WORK: CBS Sports' Shehan Jeyarajah notes membership in the new FBS subdivision "would require an investment of at least \$30,000 per year" into an educational trust fund "for at least half of its total number athletes." That would "guarantee half the schools' athletes \$120,000 over four years of competition." Money distributed by the university would also "be subject to Title IX requirements," meaning half the allocated money would be required to go to female athletes. In addition to compensation delivered

"The growing financial gap between the highest-resourced colleges and universities and other schools in Division 1 has created a series of challenges. The challenges are competitive as well as financial and are complicated further by the intersection of [NIL] opportunities for student-athletes and the arrival of the Transfer Portal."

Breaking News: A New College Athletics Subdivision

NCAA proposing new college athletics subdivision rooted in direct athlete compensation



Ross Dellenger

Senior College Football Reporter

Tue, Dec 5, 2023, 10:27 AM EST · 12 min read



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Of the many recent changes in college athletics, the most transformative — and revolutionary — may be on the way.

“[The proposal] kick-starts a long-overdue conversation among the membership that focuses on the differences that exist between schools, conferences and divisions and how to create more permissive and flexible rules across the NCAA that put student-athletes first. Colleges and universities need to be more flexible, and the NCAA needs to be more flexible too.”

The background of the image is a vibrant, stylized depiction of a sports stadium at night. Two large, bright stadium lights are visible on the left and right sides, casting a warm glow. The sky is a mix of blue and orange, with numerous small, colorful confetti pieces floating in the air. The overall atmosphere is celebratory and energetic.

2023

SPORTS LAW CLE SERIES

Proskauer»

Labor Law Update and the Revitalized Organizing Landscape

Howard Z. Robbins
Partner

Joshua S. Fox
Senior Counsel

Proskauer»

Agenda

- Labor Union Resurgence: Who, What, Where, When, Why, and How...And **Why You Should Care!**
- NLRB Has Made It Far Easier For Unions To Organize Your Workplace – **What Can You Do About It?**
- Severance Agreements In A Post-*McLaren Macomb* World — **Should You Adapt? How?**
- Lawfulness of Non-Compete Agreements — **Next in the NLRB's Sights**
- Lawfulness of Handbook Rules And Employer Policies – **What Should You Do?**
- New NLRB Joint Employer Rule—**What Is It And What Is The Impact?**



Labor Union Resurgence – Why You Should Care!

Labor Union Resurgence And Recent Strike Activity

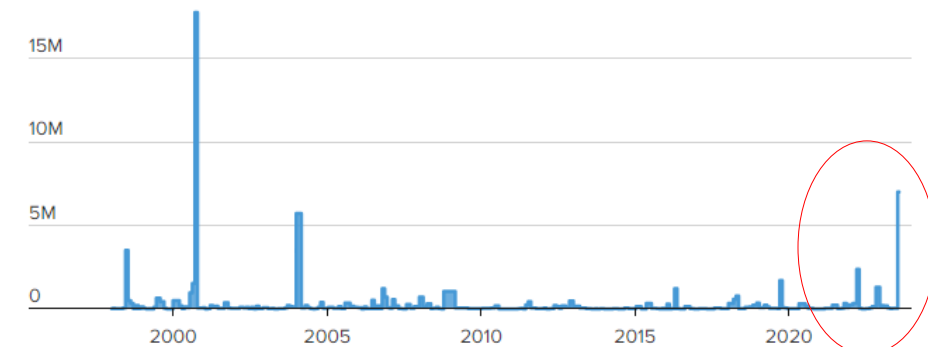


“Successful” strikes typically beget future strikes...

In The News



Days idle due to worker stoppages in the U.S.
Cumulative days idle for the month work stoppages ended



Source: CNBC analysis of data from the U.S. Bureau of Labor Statistics as of August 2023

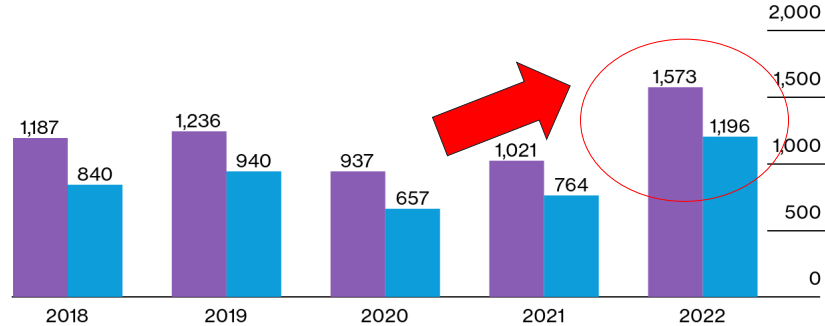
Many Issues Have Led To This Moment



Unionization And Union Elections On The Rise

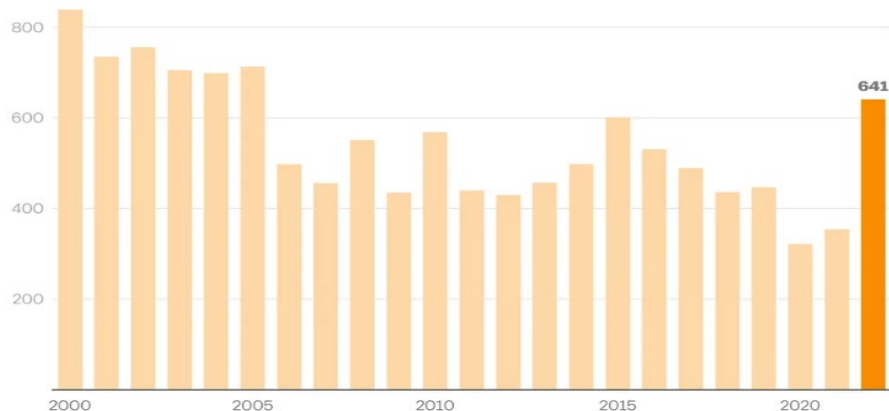
NLRB Representation Elections

■ Elections Held ■ Union Wins



Unions won more elections in 2022 than they have in nearly 20 years

Data for National Labor Relations Board elections, January through June each year



Source: Bloomberg Law

recode BY Vox

- Prior to 2022, unionization had been on a **steady decline** for decades
- Now?
 - Union elections **up by 3%** after a historic increase of **53%** the previous year
 - Union win rate in elections has increased – **76.6%** (as of 2022)
- We expect this trend will **continue to rise...**

Americans Support Labor Unions At A Much Higher Rate...

Americans Stand With Workers in 2023 Labor Disputes

Next, I'm going to read you a list of recent U.S. labor disputes. For each, please indicate which side you sympathize with more. How about ... [random order]?

	Side with workers %	Side with employer %	Both equally (vol.) %	Neither (vol.) %	No opinion %
United Auto Workers or the U.S. auto companies	75	19	1	2	3
Television and film writers or the television and film studios	72	19	1	5	3
Television and film actors or the television and film studios	67	24	1	7	2

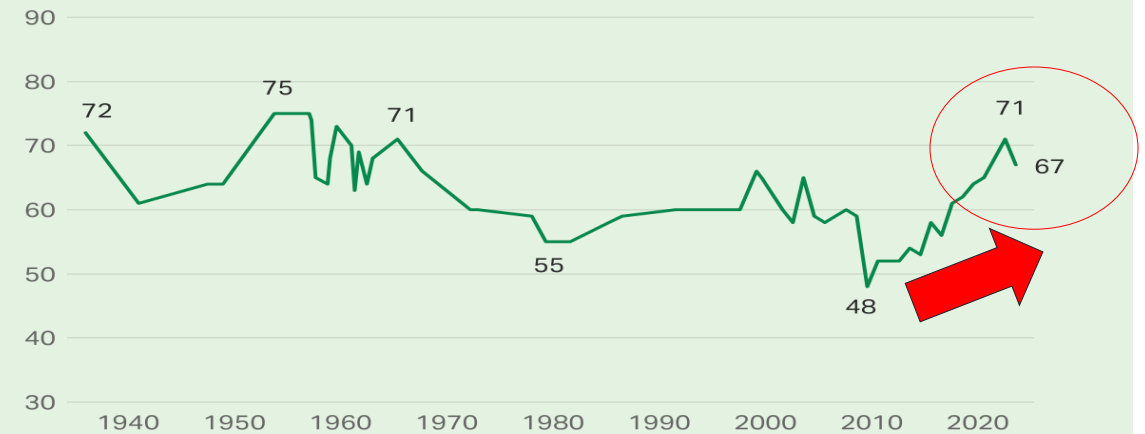
Aug. 1-23, 2023

GALLUP

Americans' Approval of Labor Unions, 1936-2023

Do you approve or disapprove of labor unions?

— % Approve



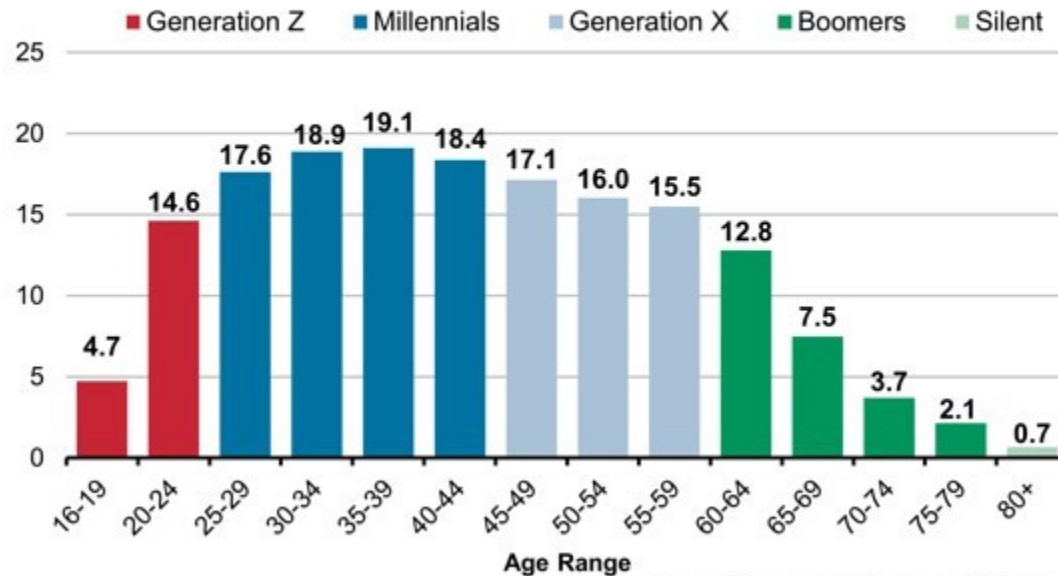
GALLUP

This sentiment likely will impact the political landscape in 2024, and beyond...

...Due In Part To A Generational Shift In The Workplace

The Workforce in 2025

Projected size of U.S. labor force (in millions) by age, for the year 2025



Source: Department of Labor | WSJ.com

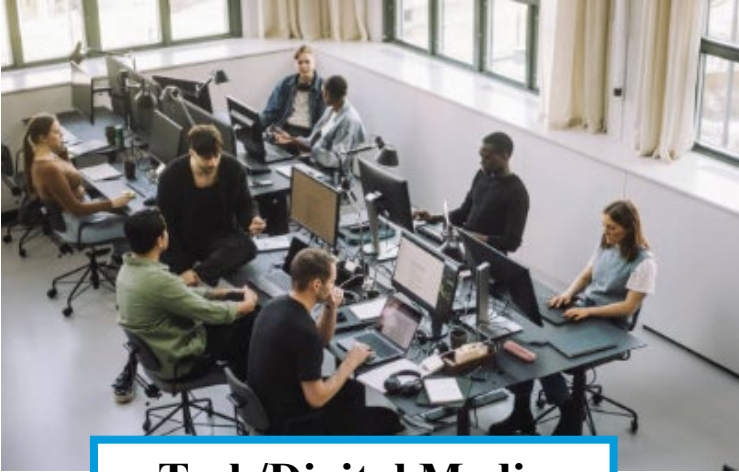
Generation Z is the generation most supportive of unions

Mean union approval rating by generation, 2020



Chart: Center for American Progress • Source: American National Election Studies, "Time Series Cumulative Data File (1948-2020)," available at <https://electionstudies.org/data-center/anes-time-series-cumulative-data-file/> (last accessed June 2022).

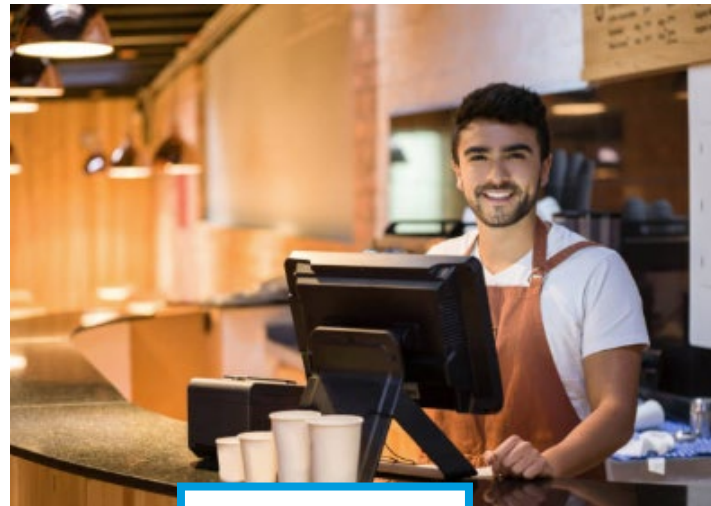
Industry Shifts: White-Collar, Tech, Higher Ed, Retail



Tech/Digital Media



Office Workers



Retail



Higher Education

Sports industry is heavily unionized – e.g., players, officials, arena/stadium staff

However, Unions may now target workers that have not been traditionally unionized in sports – such as **front and back-office staff, media, others**

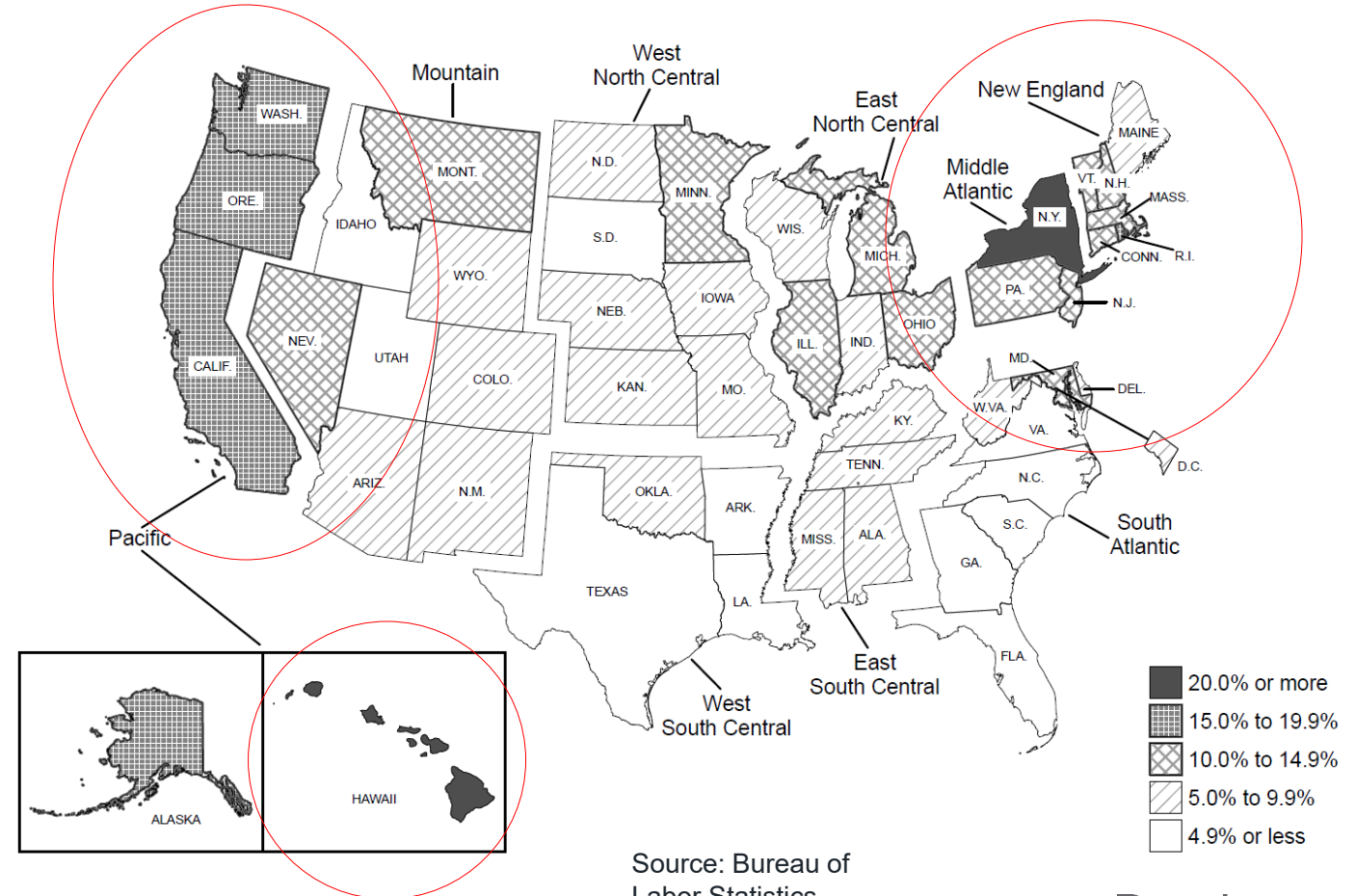
Higher education impact of student athletes and non-athletes potentially unionizing and then entering the workforce

Where Is Union Activity Occurring? **Northeast And West Coast**

- Highest unionization rates in the **Northeast, Midwest, and West Coast.**
- Lowest rates in right-to-work states in the South and middle of the country.
- States with the **largest increases in the number of workers represented by unions in 2022** were **Alabama** (+40,000), **Maryland** (+40,000), **Ohio** (+52,000), **Texas** (+72,000), and **California** (+99,000).

Chart 1. Union membership rates by state, 2022 annual averages

(U.S. rate = 10.1 percent)



What Are The Issues Driving This Resurgence?

- Workers have reported not having enough voice on **benefits, compensation, promotion and job security** – those issues are driving unionization.
- Workers have also highlighted non-economic concerns, such as **social justice issues, DEI, health and safety**, as driving work stoppages.

Work stoppages occurred for a variety of reasons in 2022

DEMAND	Work Stoppages*	Approximate Workers Involved	Strike Days
Pay	234	169,080	3,845,159.5
Health Care	77	46,691	1,263,464
COVID-19 Protocols	30	46,075	298,467
Health and Safety	107	38,978	336,364.5
First Contract	35	7,323	45,904
Racial Justice	22	8,172	121,565
Staffing	86	56,370	513,499
Job Security	30	6,012	119,805.5
Retirement Benefits	29	30,324	758,769
Union Recognition	31	8,701	77,796
End to Sexual Harassment	6	123	8,063
Scheduling	54	4,214	71,329.5
End to Anti-Union Retaliation	60	3,618	13,000
Reinstate Terminated Union Activist	29	711	10,984.5

*A single work stoppage may have multiple demands. This list is not exhaustive.

The NLRA And The NLRB's Role

- **National Labor Relations Act** (passed 1935) is the primary law governing collective bargaining and unionization.
- **National Labor Relations Board** has the authority to interpret and apply the NLRA.
- **Only** judicial body that can change NLRB precedent is the U.S. Supreme Court, and NLRA cases rarely reach that stage.



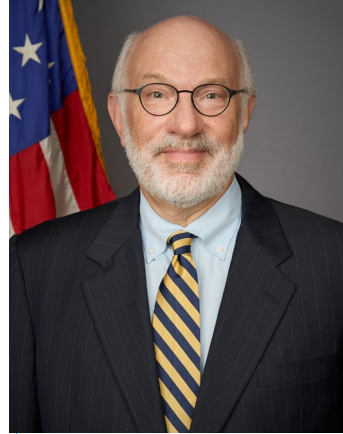
NLRB Will Feature A **Democratic Majority** Through At Least December 2024



Lauren McFerran,
Chairman
Term Expires:
December 16, 2024



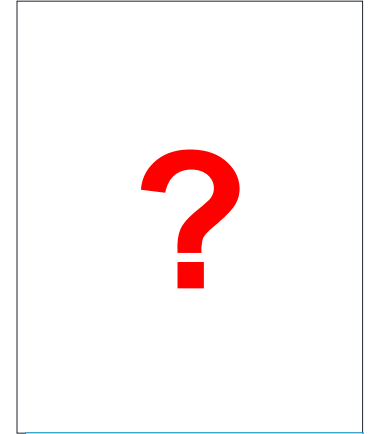
Marvin E. Kaplan,
Member
Term Expires:
August 27, 2025



David M. Prouty,
Member
Term Expires:
August 27, 2026



Gwynne A. Wilcox,
Member
Term Expires:
August 27, 2028



Republican Seat
Vacant Since
Member Ring's
Term Expired on
December 16, 2022

The outcome of the next Presidential election in 2024 will determine whether NLRB precedent shifts back again, or whether the NLRB continues on its current path.

Who Is Covered By The NLRA?

- **Only “employees” are covered** (including, potentially, former and prospective “employees”)
- Union **and non-union employees**
- **Supervisors not covered** –12-factor test applies
- Other workers **not** covered: public-sector, agricultural and domestic workers, independent contractors, managerial, confidential



What Does The NLRA Protect? Section 7 Rights

Employee Rights Protected under the Act

- Organize (or not)
- Bargain collectively
- Engage in other protected “concerted activity” for the purpose of collective bargaining or **“other mutual aid or protection”**

Pro-Union NLRB Has Reshaped Federal Labor Law Extensively In The Last Year...

- NLRB has made it far easier for unions to organize employees through the *Cemex* decision and reversion to “quickie” election rules
- NLRB has targeted areas that impact union **and** non-union employees alike – i.e., the lawfulness of:
 - Separation agreements
 - Non-compete agreements
 - Handbook rules
 - Potential expansion to other employment agreements
- Expansion of joint-employer liability
- We will discuss each of these issues and the impact on the **sports industry**



The NLRB Has Made It Far Easier For Unions To Organize Your Workplace – **What Can You Do About It?**

Representation Process for the Past 50 Years

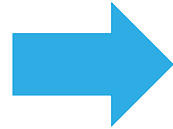
Union Action

Employer Action

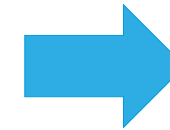
Result

1

Showing of
interest and
election petition



(1) Challenge scope
of bargaining unit /
supervisors; or (2)
no challenge.



Election

Or

Or

Or

2

Union seeks
voluntary
recognition with
majority support



(1) Voluntarily
recognize; or (2)
nothing



(1) Union
representation;
or (2) **nothing**
(Union may file
election petition)

The NLRB Dramatically Changed The Representation Process In *Cemex*

Cemex

- **New Rule:** Employer **must** recognize a union that has demonstrated majority support – unless the employer files election petition within **2 weeks**.
- Unfair labor practices during the critical period will result in a bargaining order if sufficient to set aside the election – the employer will be **required** to recognize the union.



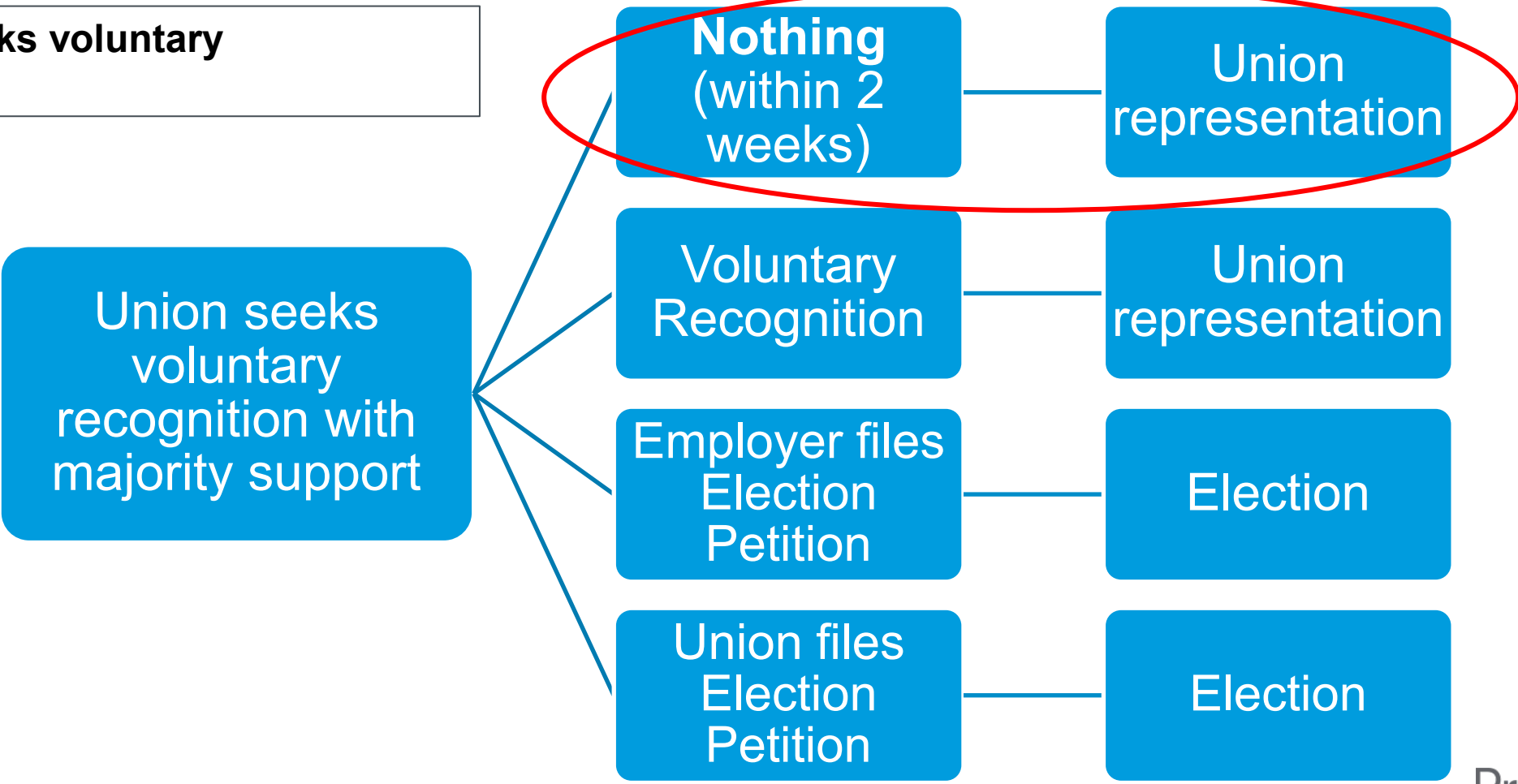
What Is The Practical Impact On Employers?

Union Action

Employer Action

Result

If a Union seeks voluntary recognition...



GC Memorandum Attempts to Clarify *Cemex*

- GC Abruzzo issued Memo providing guidance to Region on November 2
 - *Cemex* standard applies **retroactively**
 - **Authorization cards** are a **reliable indicator** of majority support
 - “*Cemex* orders” **differ from *Gissel* orders** in that the focus is the employer’s conduct prior to filing election petition and in run-up to election matter
 - **No obligation for unions** to share evidence of majority support
 - Demand for voluntary recognition may be made to **any agent of the employer**
 - Unions can **withdraw RC Petition** and reiterate demand for recognition
 - Regions encouraged to file **Section 10(j) injunctions**

Takeaways From *Cemex* Decision

- Increased voluntary recognition requests.
- **Employers must respond to such requests within 2 weeks** or face union representation without an election.
- Risk of remedial “**bargaining order**” is **greater**.



Reversion To “Quickie” Election Rules

- Effective **December 26, 2023**
- Faster timeline from petition to election.
- Individual eligibility and inclusion issues will **not** be litigated during pre-election hearing.



Takeaways From “Quickie” Election Rules

- Increased wave of petitions from **December 26, 2023 through early 2024 and thereafter.**
- Postpones resolution of scope of unit and supervisory status.
- Limits employers’ ability to message during campaign.
- Puts pressure on employers not prepared.



Captive Audience Meetings Under Attack

- NLRB General Counsel asserted captive audience meetings are unlawful under the NLRA.
- New York State Law prohibits captive audience meetings. Subject to potential preemption challenge.
- Risk assessment for employers in delivering message to employees.



Practical Guidance In Light Of These Changes

- Evaluate supervisory status
- Assess for vulnerabilities
- Evaluate Company's position
- Conduct Supervisor training
- Centralize points of contact





Severance Agreements In A Post-*McLaren Macomb* World — Should You Adapt? How?

McLaren Macomb, 372 NLRB No. 58 (Feb. 21, 2023)

- **Holding:** The mere offer of an agreement that conditions severance benefits on the waiver of an employee's statutory rights violates the Act because it has a reasonable tendency to interfere with or restrain the prospective exercise of Section 7 rights.
- NLRB focused on the confidentiality and non-disparagement provisions of the agreement.

to violate Section 8(a)(1) of the Act. Inherent in any proffered severance agreement requiring workers not to engage in protected concerted activity is the coercive potential of the overly broad surrender of NLRA rights if they wish to receive the benefits of the agreement.³³ Accordingly, we return to the approach followed by Board precedent before *Baylor*, and hold that an employer violates Section 8(a)(1) of the Act when it proffers a severance agreement with provisions that would restrict employees' exercise of their NLRA rights.³⁴ Such an agreement has a reasonable tendency to restrain, coerce, or interfere with the exercise of Section 7 rights by employees, regardless of the surrounding circumstances.

McLaren – Confidentiality

- NLRB found the following deficiencies with the confidentiality clause at issue:
 - Prohibited employee from disclosing the terms of the agreement to any third party
 - Prevented the furloughed employee from assisting their former coworkers who may also be determining whether they want to accept a severance agreement.



McLaren – Non-Disparagement

- NLRB noted the following deficiencies with the non-disparagement clause:
 - Failed to limit the scope of the agreement to matters regarding **past employment** with the employer.
 - The provision did not provide a definition of “disparagement” that comports with existing Board precedent
 - The disparagement clause was overly broad in that it extended to the employer’s “parents and affiliated entities and their officers, directors, employees, agents and representatives.”
 - The provision’s term continued in perpetuity, which the Board found excessive.



NLRB GC Guidance Memorandum GC 23-05 (March 22, 2023)



OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 23-05

March 22, 2023

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Jennifer A. Abruzzo, General Counsel

RE: Guidance in Response to Inquiries about the *McLaren Macomb* Decision

On February 21, 2023, the Board issued *McLaren Macomb*, 372 NLRB No. 58, returning to longstanding precedent holding that employers violate the National Labor Relations Act (NLRA or Act) when they offer employees severance agreements that require employees to broadly waive their rights under the Act. Specifically, the Board held that where a severance agreement unlawfully conditions receipt of severance benefits on the forfeiture of statutory rights, the mere proffer of the agreement itself violates Section 8(a)(1) of the Act because it has a reasonable tendency to interfere with or restrain the prospective exercise of those rights – both by the separating employee and those who remain employed. I am issuing this Memo to assist Regions in responding to inquiries from workers, employers, labor organizations, and the public about implications stemming from that case.

The severance agreement at issue in the case contained overly broad non-disparagement and confidentiality clauses that tend to interfere with, restrain or coerce employees' exercise of Section 7 rights. Specifically, the non-disclosure provision contained a non-disparagement clause that advised the employees that they are prohibited from making statements that could disparage or harm the image of the employer, its parent and affiliates, and their officers, directors, employees, agents and representatives. And, the confidentiality clause advised employees that they are prohibited from disclosing the terms of the agreement to anyone, except for a spouse or professional advisor, unless compelled by law to do so. The severance agreement included monetary and injunctive sanctions for breach of these provisions.¹

The Agency acts in a public capacity to protect public rights in order to effectuate the Congressionally-mandated public policy of the Act.² The underlying Board policy and purpose depends on employees' freedom to engage in Section 7 rights and to assist each other and access the Agency. And, the future rights of employees as well as the rights of the public may not be traded away in a manner which requires forbearance from future

According to GC Abruzzo:

- *McLaren* applies retroactively.
- Confidentiality provisions are lawful under only limited circumstances: (1) “narrowly tailored”; (2) targeted to proprietary or trade secret information; (3) limited in temporal scope; and (4) based on legitimate business justifications.
- Only “non-defamation” clauses are lawful.
- Unlawful provisions are severable—even without a severability clause.

NLRB GC Guidance Memorandum (March 22, 2023) – Cont’d.

According to GC Abruzzo:

- The rights are non-waivable; no “safe harbor” for employers who negotiate with union or employee’s counsel.
- A “savings clause” likely will not save overbroad provisions.
- The decision could stretch to supervisors and managers in limited circumstances (*i.e.*, retaliation).
- Other types of provisions may be at risk (non-compete, non-solicitation, no-poaching).

McLaren – What's Next In The Litigation

- On April 12, 2023, the NLRB filed an application for enforcement of its Order before the Sixth Circuit
- Sixth Circuit can decide to enforce, set aside or remand the NLRB's decision
- Losing party may file a *writ of certiorari* before the U.S. Supreme Court
- Sixth Circuit or Supreme Court *may* address some of the questions left open by the NLRB decision that were answered by the NLRB GC



Practical Considerations – What Do We Do Now?

- Is it worth amending or modifying existing separation agreements?
- Should we revise separation agreements that we plan to use to comply with the NLRB GC's directives? Is there a middle ground?
- No “one-size fits all” approach to confidentiality provisions – consideration of the company's legitimate business justifications is vital
- Is it worth adding a broad “savings” clause or is doing so counter-productive?
- Risk tolerance and evaluating the worst-case scenarios if an unfair labor practice charge is filed
- Suggest taking a “fresh look” at whether your employees are “employees” or “supervisors” under the NLRA
- What is the impact of *McLaren* on other employment agreements?



Non-Compete Agreements— Next in The NLRB's Sights?

Context Of Legal Attacks On Non-Compete Agreements

- Proposed federal and state legislation banning non-compete agreements
- NLRB General Counsel has now focused on the lawfulness of non-compete agreements under the NLRA
- Practical considerations to the use of non-compete agreements



Non-Compete Agreements: NLRB GC Memo

According to GC Abruzzo in her May 31, 2023 Memo:

- “The proffer, maintenance, and enforcement” of non-compete agreements violates the Act
- With extremely limited exception, any agreement that limits future employment interferes with Section 7 rights.



Non-Compete Agreements: NLRB GC Memo

- Non-compete agreements prevent employees from engaging in Section 7 activity.
- The only identified exceptions are agreements that relate to limiting individuals' managerial or ownership interests in a competing business, or agreements that restrict independent-contractor relationships.
- “Special circumstances” may permit a narrowly tailored non-compete agreement that infringes on employees' Section 7 rights, but GC Abruzzo did not elaborate as to what these circumstances are.



Practical Considerations – What Do We Do Now?

- Abruzzo's GC Memorandum provides insight into how the Board's various Regions will prosecute non-compete provisions.
- Business community may challenge the enforceability of the GC Memo, like it has with prior controversial GC Memos
- Uncertain whether Administrative Law Judges and/or the NLRB agree with the GC's stance
- GC Memo applies only to statutory employees, not supervisors; good opportunity to review whether your employees are "employees" or "supervisors" under the NLRA
- Potential impact on other agreements – no-poaching, exclusive employment agreements, among others?



Lawfulness of Handbook Rules And Employer Policies – **What Can You Do About It?**

Lawfulness Of Handbook Rules And Policies

- **Background:**

- **Facially-neutral handbook rules** and employer policies could violate NLRA because they infringe on the employees' exercise of Section 7 rights.

- **Why should you care?**

- Affects union **and non-union employees**
- Applies regardless of whether an adverse employment action is taken
- Most problematic if an election petition is pending; could result in “bargaining order” and certified union without an election

Once Again, The Law Has Shifted In Favor Of Employees...

- **Old Rule (*Boeing*):** Evaluates facially-neutral handbook rules based on:
 - (i) the nature and extent of the potential impact on NLRA rights, and
 - (ii) legitimate business justifications for the promulgated rule.

NLRB categorized rules for ease of application.



- **New Rule (*Stericycle*):** Two-step test now applies:
 - **Step 1:** GC must show that a challenged workplace has a **reasonable tendency to chill Section 7 rights**.
 - **Step 2:** The employer may rebut the presumption by establishing that the rule advances **legitimate and substantial business interests that cannot be achieved with a more narrowly-tailored rule**.
- Case-by-case analysis; no categorization

Which Rules Are Most Problematic Now?

- No-recording
- Civility (“be professional”)
- Appearance and conduct
- Social media
- Internal investigations and searches



Practical Considerations – What Do We Do Now?

- Unions are targeting handbooks for ULPs – particularly when filing election petitions in light of *Cemex*
- **Now** is the best time to reevaluate handbooks and policies – before likely wave of union election petitions after December 26
- Be wary about providing handbooks to NLRB in investigations
- Consider impact on collectively-bargained policies
- Conversation with counsel about legitimate business justification and whether rules are narrowly-tailored



New NLRB Joint Employer Rule—What Is It And What Is The Impact On The Sports World?

Joint-Employer Liability Under The NLRA

- Issue has long been in NLRB's cross-hairs – specifically, franchise agreements
- This can affect relationships between leagues/teams and with arena operators, vendors, and other third-parties
- Joint employers under the NLRA have:
 - Joint and several liability for unfair labor practices (applies to union and non-union employees)
 - Potential bargaining or CBA obligations with labor unions
- Potential application of other employment laws

Current Joint Employer Rule Under The NLRA

- An employer may be considered a joint employer under the NLRA only if the two employers **share or codetermine the employee's essential terms and conditions of employment.**
- This means the entity must **possess and exercise direct and immediate control** over one or more of such terms such that the entity meaningfully affects matters relating to the employment relationship.

New Joint Employer Rule

New Rule: An entity may be considered a joint employer of another employer's employees:

“if the employers share or codetermine those matters governing employees’ essential terms and conditions of employment. To ‘share or codetermine those matters governing employees’ essential terms and conditions of employment’ means for an employer to **possess the authority to control (whether directly, indirectly, or both), or to exercise the power to control (whether directly, indirectly, or both)**, one or more of the employees’ essential terms and conditions of employment.”

- The new rule goes into effect on **February 26, 2024**, which means it will only be applied to cases filed **after** that effective date.



Aggressive Legal Challenge To NLRB Rule

- November 9, 2023: U.S. Chamber of Commerce and coalition of business groups filed suit in the Eastern District Court of Texas seeking to enjoin the rule.
 - November 13, 2023: Chamber filed MSJ
- November 6, 2023: SEIU filed a petition with the District of Columbia Court of Appeals, requesting the court review and enforce the rule.
- Cases may be consolidated
- NLRB moved date of implementation from December 26, 2023 to **February 26, 2024** due to legal challenges



Takeaways from Joint Employer Rule

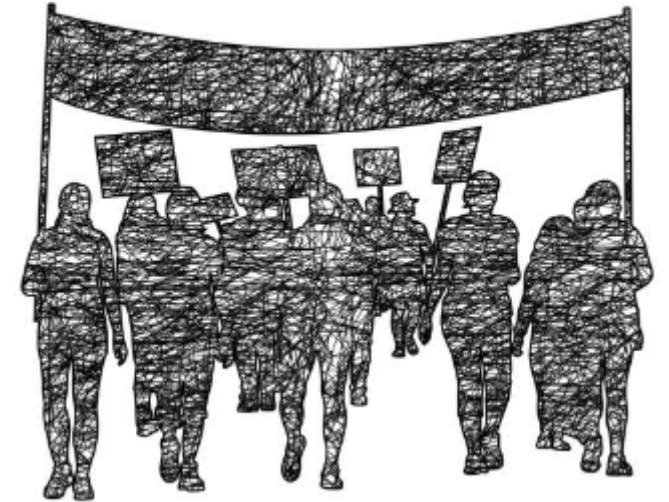
- Monitor legal challenges to rule, but assume it will go into effect
- Analyze impact on existing league/association/team and other relationships by reviewing by-laws/constitutions and any other agreements to determine whether “passive” entity exercises “in-direct control”
- Unions may – and have – threatened to invoke the new rule to broaden employer liability and collective bargaining relationships



What's Next On The **Horizon...**

Here's What We're Watching...


- **Election Rules/Cemex:**
 - Federal court interpretation
 - Guidance issued to Regions
 - Increased representation petitions end of 2023 and early 2024
 - Expansion of industries in unions' cross-hairs heading into 2024
- **Strike activity:**
 - Whether pace of strikes continue
 - Impact on contract terms
- **2024 election and political impact on these issues**




Here's What We're Watching...

- Number of litigations that are pending, which will be highly instructive on many issues:
 - **Joint-employer** rule implementation
 - Enforceability of **non-compete and separation** agreements
 - Whether **college athletes** and **graduate students** are employees under the NLRA
- GC Abruzzo may also target the unlawfulness of other employment agreements, such as **no-poaching, no-solicitation**, among others


We're On Top Of These Developments...



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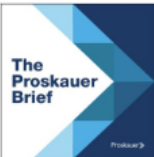



Labor Relations Update



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Covering the latest legal developments and practical solutions for employers.



 **Episode 47: The new NLRB standard on Handbook Policies and Workplace Rules**
Wednesday Aug 23, 2023

In this episode of The Proskauer Brief, senior counsels [Jurate Schwartz](#), [Joshua Fox](#), and special employment law counsel [Laura Fant](#) discuss the new standard on personnel policies and workplace rules set forth by the National Labor Relations Board (NLRB) in its August 1, 2023 decision in [Stericycle, Inc., 372 NLRB No. 113 \(2023\)](#). Be sure to tune in as we discuss why employers should take this opportunity to review their existing handbooks and policies with counsel in light of the new standard.

[Download](#) [Share](#)

Questions?



2023

SPORTS LAW CLE SERIES

Proskauer»

Navigating the Future of DEI: Legal and Practical Considerations for Employers

Evandro Gigante
Partner

Mark Bunbury
Director of Diversity, Equity & Inclusion

Proskauer»

Since May 2020....

**McKinsey Institute for Black Economic Mobility
Analysis of Fortune 1000 companies*

40%

Made statements in support of racial equity efforts

30%

Made external commitments to promote racial equity with regard to economic opportunities

25%

Made commitments to promote internal DEI efforts

\$341 Billion

To support racial equity efforts

DEI efforts lose momentum after Supreme Court ruling: Report

Starbucks Execs Hit With Suit Alleging the Company's DEI Policies Violate Civil Rights Laws

The Rise and Fall of the Chief Diversity Officer

Diversity executives hit the exits as company priorities 'everything is a battle'

Investor Sues Target Over Failed ESG and DEI Based 'Pride' Campaign

DEI backlash hits corporate America

Two Law Firms Sued Over DEI Programs After Affirmative Action Overturned



Where Does DEI Go from Here?

September 14, 2023

The Big Idea Series / **The Next Phase of DEI**

Agenda

Agenda



Supreme Court ruling in ***Students for Fair Admissions v. Presidents & Fellows of Harvard College***



Potential consequences for **private employment**



Post-ruling considerations for employers and practitioners

Supreme Court Ruling in Students for Fair Admissions v. Presidents & Fellows of Harvard College

Supreme Court Considers Affirmative Action in Higher Ed.



- On **June 29, 2023**, the U.S. Supreme Court held that the race-conscious admissions programs at Harvard College and UNC violated the Equal Protection Clause of the 14th Amendment
- The Court considered:
 - Whether it should overrule ***Grutter v. Bollinger (2003)*** by holding that colleges and universities cannot consider race as an admissions factor, and;
 - Whether Harvard and UNC's affirmative action programs violate **Title VI** of the Civil Rights Act by:
 - penalizing Asian American applicants
 - engaging in racial balancing
 - overemphasizing race over other admissions factors
 - “rejecting workable race-neutral alternatives”

The Court's Ruling: Majority Opinion

Roberts, J. (6-3)

- Under the Court's precedent in *Grutter*, the admission systems used by Harvard College and UNC were unlawful because they:
 - Did not have “sufficiently focused and measurable objectives warranting the use of race,”
 - Used race as a “negative” or a “stereotype,” and
 - Did not have clear durational endpoints

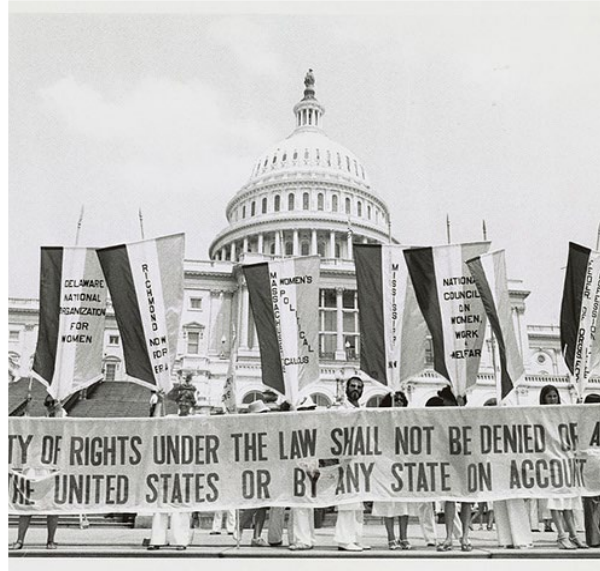


The Court's Ruling: Concurrences and Dissents

- **Thomas, J. (concurring)**
 - The **14th Amendment** is historically “colorblind” and prohibits differential treatment based on race
- **Gorsuch, J. (concurring)**
 - The universities’ race conscious admissions policies violate Title VII. Both **Title VI** and **Title VII** prohibit discrimination “because of race, color, or national origin”
- **Sotomayor, J. (dissenting)**
 - The **14th Amendment** “permits consideration of race to achieve its goal”
 - The law allows for race-based admissions in order to achieve the compelling interest of a diverse student body
- **Jackson, J. (dissenting)**
 - Because race has played a role in several legal regimes that have historically disadvantaged Black people, allowing colleges and universities to “**consider race as one of many factors**” is necessary
 - This allows for applicants to be treated on an equal basis in light of the “historical privileges and disadvantages that each was born with”

Potential Consequences for Private Employment

Direct Effects on Private Employment



Distinctions between
Title VI versus **Title VII**

Considerations for Employers and Practitioners

Considerations for Employers

- **Risks exist** – whether employers maintain their DEI efforts or scale them back
- Balancing **legal compliance** with **respect for organizational values**
- Review current **DEI strategies** and **public-facing documents**

Auditing Employer DEI Policies and Practices

Evaluating DEI initiatives – recruitment, hiring, training/mentoring, professional development, promotion, leadership, etc...

- As **written**
- As **applied**
- As **experienced** and **perceived**

- Racial equity audits

DEI Areas of Focus



Promotion and career advancement opportunities



Diversity recruitment and outreach



Accommodations programs



Diversity or representation hiring



Voluntary affirmative action plans (AAP)



Affinity/ employee resource groups

DEI Strategies

- Recruiting strategies/pipeline building
- Employee mentorship programs
- Internal and external professional development initiatives
- Affinity group training and programming
- Scholarships and fellowships
- Not for profit partnerships and grant making
- Supplier diversity
- Compensation/incentive plan awards

2023

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