

HIGHWAY TO NIL: STATE LAWS ON NIL (EPISODE 2)

JULY 13, 2022

Cal Stein (00:06):

Hello, and thank you for joining us for this latest episode of Highway to NIL. Today, we will be discussing the impact of state NIL laws on this legal landscape. My name is Cal Stein and I am a litigation partner at Troutman Pepper. As part of my practice, I have represented colleges and universities for years, including in internal investigations and state and federal enforcement actions and lawsuits. I also advise educational institutions on any number of topics, including, recently, name, image, and likeness questions. Joining me today is my colleague, Chris Brolley. Chris, why don't you introduce yourself?

Christopher Brolley (00:44):

Thanks Cal. Yeah, this is Chris Brolley, litigation associate at the Troutman Pepper Philadelphia office. And as you've mentioned, I've also advised educational institutions in all things NIL.

And I think, for this episode, we want to talk about how we got here to this day. Right now, there's a lack of bylaws or other legislation by the NCAA, or by the United States Congress, that has left NIL regulation largely to the states. The NCAA has, at times, clearly indicated its intent to defer to the states, at least until Congress acts, which the NCAA has indicated many times is what it desires.

I'd like to provide some basic state law facts. Right now, at the moment, 29 states currently have NIL laws. As you might imagine, this includes the bigger states with larger colleges and university presence, such as California, Florida, Georgia, Pennsylvania, Texas, just to name a few. 21 states and the District of Columbia do not have NIL laws, and of those 21, 12 of those states and DC have proposed, but not passed, NIL laws such as Massachusetts, New York, and Washington. One state has repealed its NIL law, Alabama, and eight states have no NIL activity, which are mostly smaller states, but there are few with significant colleges and universities: Indiana, Utah, Wisconsin.

Cal Stein (01:55):

Thanks, Chris. That is all very helpful context for the discussion we're going to have today. Before we dive in and start talking about specific state NIL laws and their elements, I want to spend a moment talking about some overarching principles of these state laws.

The first of these principles may be obvious, and that is that state laws vary from state to state, sometimes significantly. And we're not just talking about, for example, how a California law might vary from a Florida law. Sometimes, one state's law will vary from the state right next door. And the NIL laws are no exception.

As we all know, state governments vary in structure and size, and, most importantly, in the priorities that it has for a host of reasons. From that, we get very different state views on things and thus, very different state laws, even on a single topic like NIL.

Another overarching principle that may be obvious is that enforcement of state laws, again, varies from state to state, sometimes very significantly. In most states, the primary enforcement officer is the state attorney general, but once again, the size of the AG office, the authority of state AG is given, and most importantly, the views and priorities of an individual state AG are going to vary

greatly. And that variance is going to impact how, or even whether, a state AG enforces these NIL laws.

But aside from these variances, there are some similarities across the laws as well, including how they're drafted. With respect to the structure of the state laws that we're going to talk about today, there are similarities. They are typically structured to first, affirmatively permit collegiate athletes in the state to earn NIL money. This permission is typically broad, with very few details.

Second, these state NIL laws typically include a series of prohibitions often aimed at the institutions themselves, and/or intercollegiate athletic entities. These prohibitions typically have more detail, and that's where we're going to spend the majority of our time today.

The other major similarity we see across state NIL laws is an overarching common purpose, and one which largely mirrors the NCAA formal guidance, which we discussed in episode one, namely, to allow NIL payments while simultaneously avoiding pay-for-play and inducements. State NIL laws largely track these purposes in both the authorization for NIL deals and, more importantly, in the prohibitions the state laws impose.

So that leaves us with the substantive elements of these state laws. As noted, they do vary from state to state, with some states being more strict and other states being looser, but there are common substantive elements that we do see over and over again in the states that have passed NIL legislation to date.

These elements do not necessarily exist in every state NIL law, and they are hardly uniform, but the fact that we have seen so many of these common elements in various laws drafted and enacted by different state legislatures serving different populations is significant and is therefore worth discussing. So, we're going to jump in now and talk about some of the common provisions, elements, requirements that we have seen in multiple state laws.

And the first example that we have seen across many state NIL laws is a requirement, or at least a provision, that NIL compensation be commensurate with the fair market value of the student athlete's name, image, and likeness.

Currently, there are 10 states that include specific references to fair market value in their state NIL laws. This includes Florida, Georgia, Illinois, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, Pennsylvania, and Tennessee.

There are also a few states, interestingly, that appear to embrace the notion of fair market value, but do so by deferring to some other organization. Connecticut, for example, puts the amount of compensation largely in the hands of the educational institutions, allowing student athletes to earn NIL compensation so long as it complies with university policies.

In general, the goal of including a fair market value requirement, or something like it, in a state NIL law seems to be clearly tied to the prohibition set forth by the NCAA and by the individual states on inducements and pay-for-play. The theory seems to be that by limiting a student athlete's compensation to fair market value, that is a way to prevent boosters or others from paying a student athlete an outrageous amount that may induce him or her to enroll in a particular school.

Of course, no state NIL law provides details on how one might determine or calculate what is a fair market value for anyone's particular NIL services, so this is something that will likely be taken up on a case-by-case basis. We will discuss this in more detail during our enforcement episode.

Chris, what is another common substantive element that we've seen across multiple state NIL laws?

Christopher Brolley (07:30):

What we've seen is state laws addressing compensation from third parties, such as boosters and collectives, as we discussed earlier. All states with NIL laws include language that precludes institutions and athletic associations from providing NIL compensation directly to student athletes. Many of those states, however, include provisions allowing NIL compensation to come from a third party. Several of those states have included language that third parties providing NIL compensation may include "entities that support or benefit an institution or association." This language is likely geared at boosters and collectives, and some of these states are Florida, North Carolina, South Carolina, and Oklahoma.

There are also slight variances across state laws in how, and to what extent, institutions can interact with these parties. For example, in Mississippi and Tennessee recently amended its laws to lessen restrictions on schools. This appears to be reflective of a trend among some states wanting to allow institutions and those that work with them to be involved in the NIL environment.

Cal Stein (08:27):

Another common element that we have seen is the inclusion of language that could be interpreted as additional restrictions on how institutions or third-party associations are able to facilitate NIL opportunities for student athletes. Some state laws contain language that could be interpreted as prohibiting educational institutions from being a part of NIL agreements altogether. Other state laws include language that could be interpreted by regulators as going beyond that and reaching even the arrangement of NIL compensation by schools.

For example, the NIL law in Oklahoma includes language that one could interpret, or that a regulator could interpret, as limiting a school's ability to facilitate NIL by using language that states a school cannot compensate "or cause compensation to be directed at a current or prospective student athlete."

There are other states whose NIL laws appear to take the opposite approach, ie, they more explicitly permit institutions to facilitate NIL deals. For example, Missouri has recently passed an amendment that will go into effect in late August of 2022, and that amendment allows institutions to "identify or assist with opportunities for a student athlete to earn compensation from a third party" under certain circumstances, of course.

Finally, there are at least two other states that Chris mentioned, Mississippi and Tennessee, that have amendments that are outstanding that include provisions that are somewhat similar to the one I just mentioned from Missouri.

Chris, another commonly discussed element, in fact, one of the most commonly discussed elements in or across state NIL laws has to do with intellectual property. Can you tell us about that?

Christopher Brolley (10:28):

Yeah. I think what we've seen a lot is, and this is a natural segue way if you're a student athlete trying to promote your brand for NIL opportunities, is the possibility of using your school or your institution's logo or mark. Some state laws include language that suggests a prohibition on student athletes receiving NIL compensation that includes payment for such things like a school or athletic conference's logo or mark. For example, 18 states have language related to this in their state statutes, but it's varied. Six states say that student athletes may not enter a contract for compensation of NIL if it uses university property as part of the agreement.

Eight states say use of university property as part of a student athlete's NIL agreement is at the university's discretion. For example, Illinois allows a university to be paid in a manner consistent with market rates if agreed upon by all parties to the contract. One state, Arizona, says student athletes may not enter a NIL agreement that violates property rights of the university. So, as we've seen, it's pretty varied, but this is certainly consideration for student athletes to be aware of when they are promoting themselves or their brand on social media.

Cal Stein (11:31):

Another common element that we've seen across multiple states has to do with timing and provisions that could arguably restrict the timing of NIL deals. Several state NIL laws contain provisions that could be interpreted as bearing on when NIL compensation may be paid as compared to when the athlete begins his or her collegiate athletic career.

Some state restrictions are pretty concrete and reference, for example, that no NIL deals can be entered into before the student athlete has enrolled in his or her school. The thinking here is, presumably, because NIL deals cannot be used to induce a student athlete to attend a particular school, limiting student athletes' abilities to enter the deals until after they have enrolled will cut down on even the appearance of such an inducement.

But most state laws do not contain any sort of explicit provision on when NIL deals can be entered into. And one state's NIL law, South Carolina, suggests that pre-enrollment NIL deals are permitted. This is the only state right now that has such language, but it does not even say so explicitly. Rather, the South Carolina law requires student athletes to disclose NIL contracts prior to enrollment, thus suggesting that they are, in fact, permitted.

Chris, I think there's one more common element to discuss. Why don't you take us home?

Christopher Brolley (13:00):

Sure. State laws, there are certain limits to professional representation. So some state laws address professional representation, for example, agents or attorneys. For example, in Pennsylvania, the state draws a hard line. States that professional representation may not be someone who represents the university. Also, New Mexico and Oregon, the law expands restrictions to include representation of university in the past four years. And in Montana, the law permits a university to serve as professional representation for the student athlete.

Cal Stein (13:27):

Thanks, Chris. Pivoting now from these common elements that we have seen across many of these state laws, I do want to shift to another topic, and that is what law applies.

This is really a jurisdictional question. And Chris, you and I have fielded questions like this already. Sometimes, a school located in one state has a student athlete who either lives in another state or wants to have NIL activity in another state, and in the compliance department, analyzing what is and isn't allowed and what requirements need to be met, they often ask us which state law applies. Is it the law of the state where we, the institution, are located? Or is it the law of the state where the student is going to be or where the NIL activity is going to occur? Why don't you start us off on this discussion, Chris?

Christopher Brolley (14:22):

It certainly has been a topic of discussion, and the rules governing NIL compensation agreement must be considered on a case-by-case and state-by-state basis. And I think, to break it down as

simple as possible, if a state has a NIL law, the state law will apply. If a state does not have NIL law, the individual institution of higher education policy will apply.

Now, I think the question becomes, then, which state law applies, which is what you were referring to. And the law of the state in which the student athlete's higher education institution is located applies. So for example, if a student athlete that is enrolled in an institution of one state travels to another state and performs NIL services and is paid for the NIL, the state law location of this institution still applies.

Cal Stein (15:05):

There is, of course, the question of putting aside the state NIL laws. What other non-NIL specific state laws might apply to any given NIL engagement? For example, in most situations, the contract and publicity right laws of the state where the NIL agreement is entered into are going to apply, not the laws of the state where the institution is located.

And given all of these issues, it's really not going to be uncommon for NIL agreements to include what we call choice-of-law provisions. But ultimately, such a provision is only going to govern interpretations of the agreement as between the parties. For example, in the case of a lawsuit where one side accuses the other side of breaching the contract. Applicable state laws of the state where the contract is made are still very likely to apply, even if the choice of law provision is for another state. So, for that reason, even though, as Chris noted, when deciding which state NIL law is going to apply, it's going to come back to the state where the institution is located. It's still important for institutions and, quite frankly, student athletes to understand other state laws as well that may be applicable, contract and publicity right laws being at the forefront.

Lastly, there's one other question that we have gotten, and that is what would happen if there is a conflict between a state NIL law and the NCAA guidance that we talked about in the first episode? First things first, this is certainly possible, but we do think it's very unlikely that this is ever going to occur. As noted earlier, state NIL laws largely reflect the NCAA formal guidelines, at least with respect to the two primary elements and primary prohibitions that the NCAA seems most concerned with, and those are, of course, prohibiting pay-for-play and eliminating inducements.

But if the situation were to arise where there was a conflict between a state NIL law and the NCAA guidance, we would recommend exercising real extreme caution. If a student athlete were to engage in conduct that was permitted by a state NIL law, but otherwise violated NCAA guidance, he or she could lose his or her eligibility, even if what they were doing is purely legal under the state NIL law and determined to be legal by, for example, the state AG.

Similarly, an academic institution could find themselves facing an NCAA inquiry or enforcement action under similar circumstances. And with that, I think we are out of time for today.

Chris, I want to thank you for joining me on the podcast, and I also want to thank everyone for listening. I hope you will join us for our next regularly scheduled installment, in which we'll be discussing the state of NIL enforcement, including what we think may be coming next in that area.

As always, if you have any thoughts or any comments about this series, I invite you to contact me directly at Callan.Stein@troutman.com, or Chris directly at Christopher.Brolley@troutman.com.

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