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***HIRING TO FIRING* PODCAST: HOW TO MANAGE NAME, IMAGE, AND LIKENESS: AIR**  
**HOSTS: TRACEY DIAMOND AND EVAN GIBBS**  
**GUEST: CAL STEIN**

**Tracey Diamond:**

Welcome to *Hiring to Firing*, the podcast. I'm Tracey Diamond, labor and employment partner at Troutman Pepper and I'm here with my partner and co-host Evan Gibbs. Together we tackle all employment and HR issues from hiring to firing. Today we are excited to collaborate with our partner Cal Stein, a civil, white-collar criminal, and RICO litigator. In addition to Cal's robust litigation practice, Cal is an expert in name, image and likeness or NIL law, and particularly with regard to intercollegiate athletics. In fact, Cal hosts the popular Highway to NIL Podcast that discusses the legal landscape and developments in the area of NIL law.

Cal, why don't you explain to us a bit about the laws out there, protecting individuals' names, images, and likenesses, and particularly evolving NIL law in the area of college athletics.

**Cal Stein:**

Sure, Tracey. And thank you for having me. NIL is of course a relatively new concept, at least in so far as it relates to college athletes and intercollegiate athletics. For decades, the NCAA amateurism model prohibited student athletes from taking really any money or any compensation that could be tied to their status as amateur collegiate athletes. The classic example that has often been bandied about is that student athletes couldn't even get paid as counselors at a summer camp if they were teaching the sport that they played for the NCAA. That all changed shortly after the landmark Supreme Court decision in the Alston case in 2021, and that case actually didn't legalize NIL the way people think it did. Rather, it was a case that the NCAA reacted to by making the decision, the voluntary decision, perhaps to change its rules to allow student athletes to earn money for their NIL.

And as a result, since that decision in 2021, the NCAA has released a series of guidance documents on NIL and a majority at this point of US state legislatures have enacted their own NIL laws, and the long and short of all of this regulation is to allow student athletes to earn money for their name, image, and likeness to things like advertising and selling memorabilia. The primary, and some might say only real restriction that the NCAA and state laws have imposed on these activities is to prohibit student athletes from being induced through these NIL deals. And by that what we mean is schools can't induce a student athlete to come to that school or remain at that school or continue to play a particular sport at the school by inducing them with NIL opportunities.

The NIL rules and the NIL laws out there have been a little bit tricky to get your hands around because they are a little bit contradictory at times and inconsistent across states, and they have been changing pretty darn frequently. That's created some compliance issues for schools that we've been working on and certainly will continue into the future as enforcement becomes more and more common.

**Evan Gibbs:**

I'll tell you, we thought that it would be appropriate to kick off today's discussion with a clip from *Air*, which was directed by Ben Affleck and starred Matt Damon and Jason Bateman, among others. The movie, if you haven't seen it takes place in 1984 when Nike's basketball talent scout, a guy named Sonny Vaccaro desperately needed a new spokesman for Nike's basketball shoe line because the basketball shoe line was planned to close due to really low sales.

He became convinced that young Michael Jordan would be the answer to their basketball shoe woes, and then decided to try and convince Michael Jordan to come over and have a shoe deal with Nike. So they put together a prototype shoe, which was called the Air Jordan. They actually named it after the aerosol technology that Nike had at the time. And Nike ended up assigning the entire \$250,000 basketball shoe budget to hire Michael Jordan, putting all their eggs in one basket essentially. And so ultimately Michael Jordan signed after Nike agreed to give him a percentage of every Air Jordan that was sold, and that was something that was really unheard of at the time. With that little bit of background in case you hadn't seen the movie, here's one of the clips that we're going to use for our discussion today,

**Deloris Jordan:**

Mr. Vaccaro, I agree that the business is unfair. It's unfair to my son. It's unfair to people like you, but every once in a while, someone comes along that's so extraordinary that it forces those reluctant part with some of that wealth to do so, not out of charity, but out of greed because they are so very special and even more rare, that person demands to be treated according to their worth because they understand what they are worth.

**Sonny Vaccaro:**

Or their mother does.

**Deloris Jordan:**

People purport to know a good deal about my son, my son. You tell me, is it me who believes in Michael his name or am I just a healthy reflection of who he is and what he believes about himself? Isn't that why you came to my home?

**Sonny Vaccaro:**

Yes, it is.

**Deloris Jordan:**

Okay. Now I'm going to put it to you plain once again, Michael will get \$250,000 and a Mercedes-Benz that will be forgotten in a year, but he gets a piece of the revenue of the shoe and all future Air Jordan shoes. A shoe is just a shoe until my son steps into it.

**Tracey Diamond:**

Okay? And that clip was the incomparable Viola Davis who portrayed Michael Jordan's mother talking about the value and the worth of her son.

**Evan Gibbs:**

Nike expected to earn about \$3 million in sales from the Air Jordan lot. As we see in the movie, however, the company earned \$162 million in one year, and it's up to around \$4 billion in sales annually. And of course, in the wake of the Air Jordan deal, it's become commonplace for athletes to earn a percentage of sales of products that are sold with their name, image, or likeness.

**Tracey Diamond:**

My favorite line in the movie is a shoe is just a shoe until someone steps into it. While most of us regular workers do not have the purchasing power of a Michael Jordan, Cal, what lessons can we take from this story about employee rights to their name, image, or likeness, particularly when the employee is the face of the company?

**Cal Stein:**

The big lesson is about the value that a talented employee can bring to a business or a talented spokesperson can bring to a business, and especially a young one like Michael Jordan was in the movie. I mean, it's really hard, I think, to overstate the value that Michael Jordan brought to Nike, and I think it's a pretty compelling case to make that Nike would not be Nike, but for Michael Jordan joining Nike at the young age that he did. But at least for me, what comes from that lesson is probably something of an unfortunate truth and one that is actually highlighted pretty well by the story of Nike and one that I think is being learned over and over again today now by college athletes in this age of NIL. And that lesson is that businesses may pay athletes, they may pay them compensation for using their name, image, and likeness, but the business is probably always going to make a whole lot more money off of the athlete's NIL than they pay out.

And that's a disparity that is probably always going to exist, and it's one that gets at a key concept of fair value. What is fair value for an athlete, for a young athlete or even a collegiate athlete? And there's actually a great quote from an article in the New York Times, and Tracey, you had brought this to my attention and I think it fits very well here. It says whether it's an hourly worker, negotiating with McDonald's or doctors and nurses negotiating with a hospital system, what's always true is that the business is going to make substantially more than the workers. Everyone in America in a free-market system deserves the right to negotiate for their fair value.

And this is something that I think does underlie the NIL system, and it poses a question of what is fair value in the context of NIL? What is fair value for a student athlete to get their fair NIL value? And again, as I noted for years, the NCAA and its amateurism model basically forced the answer to that question to be, well, fair value is the cost of your education, it's the cost of your room and board, it's the cost of your scholarship, and now it's not. Now it's something very different. And if you look at how NIL came about, I think it leads us to that same conclusion. As I mentioned, the Supreme Court didn't force the NCAA to allow student athletes to earn NIL money. What happened was that the Supreme Court Justice Kavanaugh, in particular in the Alston opinion, wrote very pointedly, criticizing the NCAA's amateurism model, basically signaling, I think that the court in future cases perhaps was not going to allow the NCAA to continue to earn literally billions of dollars off the backs of their student athletes without compensating them.

So what did the NCAA do? They didn't want to start paying their athletes as employees. So they've come out with what I think perhaps cynically, perhaps not as a little bit of a compromise, right? We'll let you earn money for your NIL; we shift the burden to these third parties as opposed to our member institutions and maybe we keep the Supreme Court off of our back for a couple of years. It's an interesting strategy and one that has at least worked in the immediate term, although I think there's some speculation that it may not work all that much going forward.

But for that reason, so much of NIL does come back to fair value and whether the student athletes are getting fair value and maybe, some student athletes out there may be getting their fair value. There is, for example, a gymnast, a very famous gymnast at LSU who has used the NIL regulations and rules to monetize her very extensive social media following. Companies are lining up to pay her to promote their products to her millions of followers, which is great. I think that is in many ways the absolute purest form of NIL and the closest that a student athlete has to really being able to generate fair market value for themselves in a free market.

On the other end of the spectrum, I think let's take a look at big time NCAA football. For some of the conferences out there in particular, the SEC and the Big Ten, they're negotiating and executing literally billions of dollars of TV deals for their games because they have these great student athletes that everybody wants to see and all these channels want to line up to put on their Saturday programming. And the schools are the ones getting the most of the money on the backs of those star players. And those star players may be getting NIL deals. Some of them may be even getting NIL deals in the millions of dollars, although that's anecdotal. We don't have really any true visibility into that.

But even if that is happening, they're not approaching the dollars that the schools and the conferences are getting and how that compares to fair value and how that ultimately impacts what will be NIL enforcement. At some point, the NCAA is going to probably step in and say some schools, some athletes, some collectives are doing it incorrectly because they're paying too much, when in fact the numbers are still a fraction of the TV deals. I think that's going to be very, very interesting when that happens.

#### **Tracey Diamond:**

I think we're seeing this play out in other industries too. At the time of this recording, SAG is on strike, and I know that at least one of the issues that the actors are striking about is the amount of money they're being paid for residuals, for TV shows that are being streamed on various streaming services and whether they should be getting more of that profit. We can really extrapolate that to other industries as well and to less public facing employees. Just in terms of this sort of basic idea of can employers exploit, maybe exploit is too strong a word, but use employees' names, images, and likenesses in their marketing materials or otherwise to promote their products and promote their services? Because at the core, at the end of the day, a company is only as good as its employees. As Michael Jordan's mom said, A shoe is just a shoe until someone steps into it. Evan, from just a basic employee standpoint, are there any limitations on an employer's rights to use their employees' names, images, and likenesses?

#### **Evan Gibbs:**

We love to tell clients it depends on where the client is, where the employer is. There's not a federal regulation now that prohibits or imposes any specific rules around this, requiring new compensation for using somebody's picture on the website or something like that. But there are a number of states that do have restrictions on the use of a person's name, image, voice, photo, or anything like that for commercial purposes without the person's prior consent.

So there are some statutes. There are some what we call common law rules that are created by courts and the statutes and those rules created by courts. They're sometimes referred to as a right of publicity or a right of privacy type of law. Any employer that's planning to do this or may already be doing it, using employee photos for websites or something like that, if they're not already getting consent, it is generally something, I think it's a good idea, you're not going to get in trouble for getting their consent first before you use their name or voice or image, whatever. And so I think that's probably a pretty good idea.

Anyone that's listing is concerned about it, look at this on a state-by-state basis and understand exactly what laws might apply. But I think, and I've seen some clients at the beginning of employment, there will be some kind of, it may be a handbook policy that the person signs off on when they onboard or it could be something that's in a workday that you've signed when you start working. But I have seen pretty frequently employers seem to be thinking about this, and I have seen those types of consent forms, so I know it's being done at least some places. But again, I just don't think there's really any downside to having an employee sign a consent form in case you want to use something later on.

**Tracey Diamond:**

To your point about making sure your state's laws, there was a recent case in federal court in Illinois that held that facial scans taken from photographs could implicate Illinois's Biometric Information Privacy Act, which further illustrates the importance of employee consent. I'm curious to see what happens whether the student athlete situation, which has gotten so much press and whether the SAG strike will just sort of shine a light on this issue for regular employees, and in particular for unions where unions will go after employers at the bargaining table to get some recompense for their union members for use of their name, image, and likeness that the company's profiting from.

**Evan Gibbs:**

Thinking about that, thinking about how broadly this impacts, I'm trying to think of some industries or types of companies where this would really be a big problem. Most companies, their employees may not be attractive and they'll be on the website, so a lot of times they're using stock photos and things like that. I'm curious, I'm thinking outside of the entertainment industry, I'm trying to think how often this would come up for other companies.

Maybe the area where this could come up is maybe with company social media posts, for example and that's pretty common. You have a company at Z, get everybody's picture, put it online, something like that. I could see, especially maybe if you got an employee who's like a serious influencer and you stick their picture online and tag, they're like, "Oh, now, oh, that's your treadmill, my brand here, and you've got compensate me to use me in the company photo on LinkedIn or whatever." So I think that's maybe an area where we could see this come up. Can y'all think of any other industries or any particular scenarios where this might come up?

**Tracey Diamond:**

I mean, you see it at LinkedIn all the time, right? Companies posting events that have employees in the pictures, awards that were given that have employees in the pictures, that sort of thing.

**Cal Stein:**

It definitely could arise in the college athlete context, but of course right now they're still not employees and one day they might be. In fact, if you ask most people, including myself, I would speculate that at some point in the future, perhaps the relatively near future, collegiate athletes are going to become employees, at least to some degree of these universities.

**Tracey Diamond:**

Wasn't there a Supreme Court case recently where one of the justices said that student athletes are the labor market? Wasn't that the term that was used?

**Cal Stein:**

Yeah, you're referring to Justice Kavanaugh in the Alston case. That's the one that kind of set this whole thing off, that spooked the NCAA into giving them NIL rights. But you raised the exact correct point, Tracey, which is the Supreme Court, has already signaled its view on this exact issue. It seems to many, including me, that it's just a matter of time. It's almost an inevitability that the right case is going to proceed through the courts and get to the Supreme Court, and there's going to be a decision that ultimately forces the NCAA hand or otherwise results in at least some student athletes becoming university employees. And once that happens, this particular issue that we're talking about right now is going to become absolutely paramount because right now the universities have pretty much carte blanche to use their athletes the way they want.

**Tracey Diamond:**

I could see there being lots of consequences there, whether intended or unattended in terms of the cost to the universities to keep the programs going if it's going to cost that much more to pay their athletes. And what that means in terms of budget cuts and how that will affect certain teams, as well as ensuring that the diversity of teams from a gender perspective remains comparable under Title IX.

**Cal Stein:**

That's probably the biggest issue right now is how would you marry student athletes being employees with the requirements of Title IX? Because let's face it, there are many sports that do not generate revenue for universities. How could the university pay those athletes or devote similar or equivalent funds to those sports as it would to men's football or men's basketball, for example, which as we know are huge revenue generators.

In fact, and not to get too into the weeds of collegiate athletic finances, but I think it's relatively well known that for big schools, football and basketball pay for all the other programs. And that's one of the things that Title IX has done, and it's been a great benefit for many schools and many student athletes and many programs. What's going to happen to that if as many people think these athletes do become employees? And I don't have a good answer for that, I don't think anyone does, but it's certainly going to be something that's going to require some major attention and perhaps some congressional action vis-a-vis the existing Title IX statute.

**Tracey Diamond:**

So interesting. It'll be very interesting to watch this area as it continues to evolve. The movie *Air* does illustrate some other really important workplace issues that we want to highlight though,

particularly with regard to hiring good people and trusting them to do their jobs well. In the movie, Nike CEO Phil Knight is skeptical at first about putting all of the company's efforts into the Air Jordan deal or even calling the shoe "Air Jordan" in the first place. Let's listen to a clip between him and Vaccaro when he comes around and agrees to Dolores's terms.

**Phil Knight:**

What happened?

**Sonny Vaccaro:**

We didn't get him.

**Phil Knight:**

I heard you were down there closing with mother.

**Sonny Vaccaro:**

Adidas matched. He needs more.

**Phil Knight:**

More money?

**Sonny Vaccaro:**

I'm sorry, Phil. He wants a piece of the shoe, a gross revenue, everything with his name on it. I know, I'm sorry.

**Phil Knight:**

Jesus Christ.

**Sonny Vaccaro:**

I'm really sorry.

**Phil Knight:**

We should do it. Correct me if I'm wrong, Sonny, I thought you believed in this guy.

**Sonny Vaccaro:**

Of course I do.

**Phil Knight:**

There's not a lot of point in having a basketball groove if you don't listen what somebody has to say.

**Sonny Vaccaro:**

The board's never going to do that. It has never happened before. You'd be putting yourself in a real bad spot. They could call for your removal.

**Phil Knight:**

If this guy is who you think he's going to be, it'd be the best thing that ever happened this company, and it'd be worth every penny. Let me worry about the board.

**Sonny Vaccaro:**

It's a big risk.

**Phil Knight:**

You're remembered for the rules you break. Close the deal. Hey, Sonny. That's how I built this company.

**Sonny Vaccaro:**

I get it, Phil.

**Tracey Diamond:**

Evan, what lessons about leadership can we take away from this?

**Evan Gibbs:**

It's a skill to be developed and needs constant refinement, but that's of delegating and trusting those around us, right? That is one of the basic block and tackle skills of being a leader. But it's not easy to do. It's really not. And I don't know if lawyers are just particularly bad at it, but it's certainly something that I struggle with every day, learning how to delegate and not need to sort of fly spec every little thing, but then things that all employers face too. Getting your employees to buy into your vision of the company and the company's values, where company leadership sees the company going, or making sure that employees are fully bought in to that, everybody's rowing in the same direction, so to speak.

And then of course, in the course of all that, giving employees the space to be creative and not stifling them, letting them be able to flex those creative muscles and come up with creative solutions to some tough problems like we saw here.

**Tracey Diamond:**

In the movie, you see Vaccaro at one point very blatantly asking for forgiveness instead of permission when he physically goes to Michael Jordan's house to try to convince the family to get Michael to sign on to the Nike deal, going completely against his supervisor's instructions. And I think that's a really interesting point to make. It made for good television or good movie watching, but in real life, that could be super hard for a company to allow that space for creativity while also putting some guardrails in place to ensure that employees don't completely run amok and that they stay focused on the mission.

And to your point, Evan, I think making sure that employees are bought into the mission in the first place is that everybody's working towards the same goal is what really is so important there.

**Evan Gibbs:**

That's right.



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**Tracey Diamond:**

That last clip ended with the slogan, if we do the right things, we'll make money damn near automatic. It's not always easy to do the right thing or even to identify what is the right thing to do, but at least in the case of Nike, the lesson is that it certainly can be lucrative.

**Evan Gibbs:**

Yeah, there's no doubt about that.

**Tracey Diamond:**

All right, listen, many thanks to Cal for joining us today, and to our listeners as always, for tuning in. Please check out our other podcast episodes and don't forget to also check out our blog [HiringtoFiring.law](http://HiringtoFiring.law).

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