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How NCAA Athletes and Brands Can Avoid Big Mistakes in NIL Influencer Agreements

WRITTEN BY

L. Andrew Tseng | Sean P. McConnell

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Authors:

L. Andrew Tseng

Sean McConnell

Nicole Demas*

** Nicole Demas is a former intern at Troutman Pepper and a third-year law student at the University of New Hampshire Franklin Pierce School of Law. She is not admitted to practice law.*

The biggest event of the year in college sports just concluded as national champions were crowned in men's and women's basketball, and hundreds of thousands of college athletes are entering the influencer marketplace for the first time. College athletes now find themselves attractive candidates in the fast growing influencer marketing arena. Industry experts estimate that this market grew to a \$13.8 billion industry in 2021, with NCAA athlete advertising alone predicted to grow to \$1 billion a year within five years. With influencer marketing potentially providing a [5x return on investment](#), many brands are eager to get into the industry, but it doesn't come without risks. With the FTC Commissioner taking a closer look at the use of influencers for marketing, student athletes and brands should take care when entering into the influencer marketing arena. See, "[Statement of Comm'r Rohit Chopra Regarding the Endorsement Guides Review](#)," Comm'n File No. P204500 (Feb. 12, 2020).

Beginning on July 1, 2021, NCAA athletes were able to start making money from deals that include their Name, Image, and Likeness (NIL). This was a major change. Previously, athletes who wanted to play for teams in the NCAA could not profit from their NIL without losing amateur status, and thus their opportunity to play. This change came about after states began passing NIL legislation and the NCAA lost 9-0 at the Supreme Court in the *Alston* case. *NCAA v. Alston*, 141 S. Ct. 2141, 2153 (2021). While the *Alston* case dealt with the NCAA's restrictions of education-related-benefits on an antitrust basis, and not specifically NIL, the opinion and concurrence broadly signaled that any subsequent cases dealing with the NCAA's restrictions of student compensation would be unlikely to end in the NCAA's favor. Thirty states have NIL legislation currently in effect, with six more bills set to go into effect by 2025. The laws and policies around monetizing NIL vary by state and school, and have left a patchwork for student athletes to navigate going forward.

As a result, the NCAA adopted an “interim” policy in late June 2021 in response to these laws going into effect, a lack of federal legislative action, and the outcome of *Alston*. The policy allows college athletes to profit from their NIL while maintaining their amateur status under the NCAA bylaws. This policy will stay in effect until federal legislation or new NCAA rules are adopted. But, it seems unlikely that a federal framework will be in place anytime soon. Though lawmakers have introduced six different NIL bills on a federal level over the last two years, most dying in committee, Congress has been unable to reach a compromise on the scope of such a bill. With this in mind, brands need to be aware of both the state laws and school rules that govern before entering into an agreement.

Additionally, in November 2019, the FTC adopted new guidelines for influencers and brands. See, “[FTC Disclosures 101 for Social Media Influencers](#)” (Nov. 2019). Shortly thereafter, in February 2020, the FTC announced increased scrutiny on the influencer marketing arena, with Commissioner Rohit Chopra calling for [tougher remedies for companies “AstroTurfing,”](#) *i.e.*, having influencers release paid ads that look like unsolicited reviews. See, . The FTC’s statement put brands on notice of the agency’s goal to “be forward-looking to stop fraud from festering” and signaled the Commissioner’s intent to seek tougher remedies for companies engaging in deceptive advertising.

For student athletes, there are other concerns. While the FTC indicated a focus on pursuing action against advertisers, not “small influencers,” influencers may still be held personally liable by other companies or consumers [for false advertising](#) or trademark infringement.

Company/Brand Considerations

Contracts

Just like any other advertising deal, a student athlete influencer agreement should be comprehensive and signed by both parties. Make sure student athletes sign these agreements rather than informally accepting, *e.g.*, via direct message. While some schools are actively involved in arranging NIL deals, other state laws forbid the practice, and still other schools will not facilitate relationships between brands and their student athletes to avoid the conflict of interest. This means that student athletes need to either be contacted directly, or through one of the numerous third-party agencies that have been operating since July. Before entering into an agreement with a student athlete, make sure to clearly communicate the goals and expectations of the influencer contract and prepare the contract to reflect that. Consider how long the relationship will last, what limits there are on the timing of posts, and what the athlete can and cannot say. Keep in mind the goal of bringing goodwill to the brand through the arrangement.

Standard contractual clauses should be double-checked to ensure coordination and compliance with the brand’s business and legal objectives. Brands should also consider the differences in state NIL laws when incorporating choice of law clauses into their agreements. For example, while the California NIL bill does not allow for contracts that conflict with the “athletes team contract,” the Texas NIL bill goes even further and does not allow for any contracts that conflict with “a provision of an institutional contract of the institution, a policy of the athletic department of the institution, or a provision of the honor code of the institution.” S.B. 26, Gen. Assemb., Reg. Sess. (Ca. 2019); S.B. 1385, Gen. Assemb., Reg. Sess. (Tx. 2021). As a result, a California contract may not work in Texas.

Additionally, brands should consider different college and university policies before entering into advertising agreements. For example, some colleges do not permit athletes to wear any school branded gear in connection with promotion opportunities. See, Georgia Southern University, Name, Image & Likeness Guidance and FAQ (Sept. 3 2021). Other schools limit the types of brands athletes may work with. See, [UMass Student-Athlete Name, Image & Likeness \(NIL\) Plan](#) (July 1, 2021).

As liability can flow from the influencer to the brand, brands should consider whether to include an indemnification clause protecting them from any false or misleading statements made by the influencer. Conversely, brands should also understand the benefits and risks of either indemnifying or not indemnifying an influencer. For example, a brand may choose to include an indemnification clause covering liability resulting from the brand's actions, to potentially avoid a public relations problem (or retain greater control over litigation strategy) if a competitor or consumer sues a student athlete.

Required Disclosures

Brands should provide every influencer with clear and simple instructions for how to disclose their relationship with the brand to their followers. The FTC requires that influencers indicate clearly, in simple language, that a post is a paid ad. But if a paid ad looks like an unpaid review, the FTC may take action and impose penalties on the brand, including cease and desist orders, fines, or, potentially, civil penalties under new guidance from Commissioner Chopra.

Influencer Content

Liability for deceptive advertising is based on the content of the ads. Brands are therefore liable for claims made about their products or services made by influencers. Even if an advertiser discontinues the deceptive or unfair practice, the FTC will typically still continue with proceedings, especially if the practice is only discontinued after becoming aware of FTC scrutiny. For example, in December 2019, Teami faced an FTC enforcement action not only for making unsupported health claims, but also for influencers who were not adequately disclosing their relationship with the brand. *FTC v. Teami, LLC*, No. 8:20-cv-00518 (M.D. Fla. R. 2019). The court ordered the brand to closely monitor influencers and immediately terminate any who did not comply with disclosure requirements. The court further issued a more than \$15 million judgment in favor of the FTC.

To help mitigate the risk of an FTC action, brands should consider implementing a reasonable training, monitoring, and compliance program for their influencer advertising network. For example, brands may benefit from educating their influencers on general advertising do's and don'ts. Providing strong, consistent, and well-regulated brand guidelines with any agreement, gifted product, or other advertising relationship may help avoid potential false or deceptive advertising claims.

Brands should also consider having an attorney review any scripts sent to influencers and implement a program to monitor compliance. Though a brand may value and, in fact, seek out influencers who put their own spin on the brand's message to better engage with their audience, it should still carefully balance the benefits of influencers "going off script" with the potential risks. To that end, brands should implement a clear strategy to monitor what their influencers are saying and take corrective measures if its influencers violate FTC or brand guidelines. This is especially important, given that one report found the overwhelming majority of top celebrity influencer

endorsements failed to follow FTC rules. Mediakix.com, 93% of Top Celebrity Social Media Endorsements Violate FTC Guidelines, <https://bit.ly/3wo7OSW> (last visited Mar. 21, 2022).

Brands have choices on how much control they exert over influencer content. Options range from proactively reviewing ads before they are posted, to reactively taking down ads that do not comply with FTC or brand guidelines. The best option for a brand will vary, depending on the number and type of influencers as well as the brand's resources.

How Should I Deal With the Contract?

Read the entire document. If a term is confusing, don't be afraid to ask or seek out a professional service provider (e.g., an attorney, agent, consultant, tax advisor) for help. Make sure the agreement is in a separate document, not just a DM. This allows you to fully review everything the agreement covers. Understand the tax consequences of the agreement. Since influencers may likely be considered contractors rather than employees, student athletes could be responsible for paying federal and state taxes on their own.

Also [check if your state](#) has special NIL laws that need to be followed. For example, [Georgia's NIL](#) bill does not allow student athletes to enter into contracts that conflict with the student athlete's team contracts. As a result, a student athlete in Georgia may want to consider checking with their school before entering an agreement. Also, schools may have further rules that need to be followed. Many schools make these rules easily available online.

Some schools will help athletes find NIL contracts. Keep in mind that, unlike a professional service provider, the school does not work for the athlete and will likely be more protective of the school's interests than the athletes. Some law schools offer sports law clinics, which can provide an athlete with legal advice for free. And even if you don't think you have the bargaining power to negotiate individual terms, make sure you understand the terms and decide if this is a deal you really want.

What Do I Have to Disclose?

If you work with brands to recommend or endorse their products, the Federal Trade Commission (FTC) requires you to disclose that your post is a paid ad. The FTC's guidelines for social media influencers require that the disclosure:

1. Be clearly placed and not hidden, *g.*, in hashtags or the bottom of the post. Superimpose it over images and videos and say it slowly and clearly in audio.
2. Use simple, clear language. Stay away from abbreviations or confusing language.
3. Clearly indicate your relationship with the brand, *g.*, a gifted product and/or a sponsored ad.

While the FTC may focus on pursuing legal action against brands rather than individual influencers, failing to disclose your relationship with the brand may violate the brand's guidelines, and may cause the brand to terminate your agreement.

What (Not) to Say in Ads?

There may be legal consequences to what you say in ads. To avoid engaging in deceptive advertising, don't say things about the product that aren't true. Brands may give you a script of what to say. When you get the script, don't be afraid to ask follow-up questions. If the script makes claims about the effectiveness of a product, ask where that information came from. If the product does not work as the script says, talk to the brand about the claim. If a product script says it smells great, but it smells like rotten eggs when you receive it, don't just say it smells great. Again, check with the brand to see that you received the right product. If you got the right product and it does not work or it smells terrible, don't make claims to the contrary.

Make sure you understand how to talk to a brand about this before you enter into the agreement. Also, if a product intentionally tries to look like another product (e.g., a knockoff or "great dupe"), it's best not to take that deal. By taking reasonable steps to protect yourself, and by making sure you are not saying something false or misleading, it reduces (though doesn't eliminate) the possibility of a false advertising lawsuit.

How Will the Brand Enforce Guidelines?

Brands monitor their ads in different ways. Know how the brands you work with will monitor your posts. Find out if the brand needs to approve a post before it goes up, or if they can force you to take a post down. If it isn't clear from the terms of the agreement, ask. Understand what is and isn't acceptable from the brand's point of view. If they offer a script, it may be in your best interest to stick to it, both to maintain a good relationship with the brand and to protect yourself from legal liability.

Can I Be Held Legally Liable?

In short, yes. Know that advertising activity can lead to lawsuits. If you make a false statement about a product, infringe on a trademark, or fail to follow FTC guidelines, a lawsuit could follow. Factor that in when deciding whether or not to accept an agreement. A brand may or may not indemnify an advertiser from personal liability for advertising. Indemnification can mean that the brand agrees to take financial and legal responsibility for lawsuits resulting from an ad. It is a clause in your agreement that may be worth bringing up in the negotiation phase, so you can fully weigh the risks of entering into an agreement.

Conclusion

Influencer advertising for NCAA athletes stands to become a huge market with potential benefits for both brands and student athletes. However, both should tread carefully, as the FTC has signaled an intent to step up its monitoring and enforcement. A patchwork of state NIL laws adds complexity to student athlete influencer agreements, and brands should consult with their legal and business teams. Student athletes should also take care when signing an endorsement or advertising agreement, and should strongly consider taking advantage of the NCAA Policy allowing them to "use a professional services provider for NIL activities," including a legal service provider.

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