

***Highway to NIL* – Executive Order Breakdown: President Trump's Vision for College Sports and NIL Reform**

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Hello and welcome back to *Highway to NIL*, the podcast series that discusses legal developments and the name, image and likeness or NIL space. NIL of course affects colleges and universities all over the country, particularly those in Division One athletics. In this podcast series, we delve deep into the current NIL rules impacting colleges and universities and their compliance departments. My name is Cal Stein and I'm a litigation partner at Troutman Pepper Locke. I'm coming to you today solo to talk about a discrete issue, which is an executive order that was released by the Trump administration just last week. Executive orders of course, are nothing new to the Trump administration and they can and do serve a very valuable purpose. And this executive order is no exception. I'm not completely sure on this, but it strikes me that this executive order titled Saving College Sports is probably the first time in the history of the United States that a US president has issued an executive order devoted exclusively to college sports and not a moment too soon, at least if you ask me, we've talked on this podcast about how a national solution is likely necessary for college sports.

And while this executive order is not law and does not have the force of law, it does in my view represent the most significant foray yet of the Trump administration and really the federal government as a whole into the murky waters of college sports and NIL, particularly in the post House settlement world. So today we're going to go through the executive order. We're going to pick out some themes that are important and we're going to discuss what they might mean for college athletics in the post House settlement world going forward. Let's start with some basics. What is an executive order and what is not an executive order? Well, an executive order is a written directive from the president of the United States and the President of course is in charge of the executive branch of the federal government. And the Constitution grants the president responsibility and the obligation to ensure that the laws are faithfully executed and executive orders are a tool for achieving this.

And this one is no different. Really the best way to think about an executive order is to think of it as a policy directive. They can be thought of as a formal written policy of the president as the individual in charge of the executive branch directing the individuals and the agencies that he oversees in the executive branch on how he wants that branch to be managed. Now it is important to note that executive orders are not law. They do not require approval from Congress, but Congress also cannot overturn them. So while they are not law, they do have a significant impact on how the executive branch as opposed to the legislative branch, but how the executive branch operates. Alright, so let's turn now to President Trump's executive order released on July 24th called Saving College Sports. And as a brief overview, the executive order is only a few pages, but it contains six sections.

Section one is the purpose and policy. Section two is titled Protecting and Expanding Women's and Non-Revenue Sports and Prohibiting Third Party Pay for Play Payments. Section three is titled Student Athlete Status. Section four is titled Legal Protections for College Athletics from Lawsuits. Section five is titled Protecting Development of the United States Olympic Team. And Section six are general provisions. We're going to focus on the first three sections only because those are the meatiest sections in terms of announcing Trump administration policies, and we're going to talk about those policies and how they may impact the NCAA and schools and overall enforcement going forward. Okay, let's start with section one titled Purpose and Policy. And this is the longest section of the executive order by far. We're not going to read all of it, but there are a few pieces of it that I think are worth reading so that we can get a sense of why. Why did President Trump and his administration decide to release this particular executive order at this particular time?

So I'm not going to read the whole thing. I'm going to jump around a little bit. One of the things President Trump says in this executive order is that "the future of college sports is under unprecedented threat. Waves of recent litigation against collegiate athletics governing rules have eliminated limits on athlete compensation, pay for play, recruiting inducements and transfers between universities, unleashing a sea change that threatens the viability of college sports. While changes providing some increased benefits and flexibility to student athletes were overdue and should be maintained, the inability to maintain reasonable rules and guardrails is a mortal threat to most college sports." Let's pause there. Some really pointed language by President Trump in this particular section and we're starting to see the urgency with which he and his administration are viewing the need for federal intervention in college sports. He goes on to say in section one, "guardrails designed to ensure that these were legitimate market value, NIL payments for endorsements or similar services, rather than simply pay for play inducements were eliminated through litigation. Other limits on player transfers among schools were also taken down through litigation. This has created an out-of-control rudderless system in which competing university donors engage in bidding wars for the best players who can change teams each season." Again, very, very pointed language, discussing the urgency of the situation. And I think President Trump has hit on something here that we have talked a lot about on *Highway to NIL*, which is Look, NIL. When it started, it was intended to be one thing, the NCAA, the schools, they all expected it would be one thing, and in fact is it's kind of turned into something else. The market value NIL payments for endorsements or similar services, that's probably what everyone thought NIL was going to be. And it really has not been that through the lack of rules and through the elimination of rules through litigation, which President Trump mentions here as well.

He goes on, he says "This not only reduces competition and parity by creating an oligarchy of teams that can simply buy the best players — including the best players from less-wealthy programs at the end of each season — but the imperative that university donors must devote ever-escalating resources to compete in the revenue-generating sports like football and basketball siphons away the resources necessary to support the panoply of non-revenue sports. Absent guardrails to stop the madness and ensure a reasonable, balanced use of resources across collegiate athletic programs that preserves their educational and developmental benefits, many college sports will soon cease to exist." Perhaps the most pointed language in the entire executive order, talking about oligarchy and stopping the madness. But buried in this is a very important component of this executive order, which is President Trump's focus on preserving athletic opportunities, not necessarily in the revenue sports. He and we, and everyone knows those aren't going anywhere, but in other sports, in my view, President Trump in this executive

order is reading the writing on the wall, and he's looking to preempt and prevent schools from taking action to eliminate or limit some of these non-revenue and women's sports.

And that is an important lens through which we should look at this entire executive order. We're going to skip now to the end of section one, the very last paragraph of the purpose and policy section where he summarizes the policy of his administration. He says, "It is the policy of my administration that all college sports should be preserved and where possible expanded. My administration will therefore provide the stability, fairness, and balance necessary to protect student athletes, collegiate athletic scholarships and opportunities and the Special American Institution of College Sports. It is common sense that college sports are not and should not be professional sports and my administration will take action accordingly." The two big pieces here that I think are worth mentioning, the focus on all college sports, preserving and expanding them, and the warning that college sports should not become professional sports. And really in many ways this idea clashes with what we have seen some judges, some federal judges say, where they have drawn clear lines and said, look, this idea of amateurism is dead and they have created a de facto professional minor league system.

President Trump very clearly wants to preserve college sports the way it was in some form or another. So what can we take away from this purpose and policy section? What are some of the key points that we think illustrate how President Trump and his administration are viewing college sports? And again, that will be important as a lens to be the rest of this executive order. There are three things really. Number one, it's pretty clear to me that President Trump thinks college sports is currently out of control. He's happy that student athletes are now able to make money, but he believes there need to be significant rules and guardrails in place. Number two, President Trump seems to think college sports needs some modicum of parity. He referenced the highest revenue schools as an oligarchy. That is not a term of endearment. And number three, President Trump is very clearly focused on protecting and preserving non-revenue sports and women's sports and opportunities for student athletes in those sports.

He is very concerned that these will be casualties of the post House settlement world and he wants to protect that from happening. Alright, that's a great segue into section two of the executive order titled, Protecting and Expanding Women's and Non-Revenue Sports and Prohibiting Third Party Pay For Play Payments. There are really two components of that, the Protecting and Expanding Women's and Non-Revenue Sports, and then the Pay for Play Payments. We'll address each one in turn. Let's start with the protection and expansion of women's and non-revenue sports. This is what section two says: "It is the policy of the executive branch that opportunities for scholarships and collegiate athletic competition in women's and non-revenue sports must be preserved and where possible expanded." Now, President Trump goes on in several subsections of this executive order to give specific detailed guidance on what he believes and what the executive branch believes athletic departments should be doing.

He says athletic departments, if you have more than \$125 million in revenue, you need to be offering more scholarships for non-revenue sports than you did last year, and you should be providing the maximum number of roster spots for non-revenue sports. If your athletic department has more than \$50 million, but less than 125 million in revenue, you should be offering at least as many scholarships as you did previously and still the maximum number of roster spots. And then for athletic departments that have less than \$50 million in revenue or don't have any revenue generating sports, the directive is that you not disproportionately reduce

scholarships or roster limits on the non-revenue sports. Really, it's a pretty simple directive from the Trump administration. Their policy seems to be that the more money a school has, the more it can be doing and the more it should be doing. And dare I say, the more it must be doing to spread the wealth and maintain non-revenue and women's sports.

Okay, let's shift now and talk about the second part of this section, which is Prohibiting Third Party Pay for Play Payments. And here's what President Trump said about that. He says, "to preserve the critical educational and development benefits of collegiate athletics for our nation, it is the policy of the executive branch that third party pay for play payments to collegiate athletes are improper and should not be permitted by universities. This policy does not apply to compensation provided to an athlete for the fair market value that the athlete provides to a third party, such as for a brand endorsement." Now, in my view, in a way, this is the most critical piece of the executive order because this is something that he is speaking directly, in my opinion, to the schools and to the NCAA. And it really reveals President Trump's view on this, and his focus is not on all pay for play payments, only those by third parties.

So he's not talking about institutional pay for play. And that actually makes some sense, right? Because the House settlement creates a scenario where institutions can make pay for play payments to their student athletes. So President Trump here is taking aim at third party pay for play, not third party NIL for legitimate reasons, for brand endorsement, but third party pay for play. Now, currently as things stand right now, there is an NCAA bylaw that prohibits pay for play payments to college athletes. It's the same bylaw that's been in place for some time. Now, I think fairly obviously, that bylaw is going to have to be either repealed or amended because the House settlement allows schools to pay players, and technically those payments would be in violation of this current bylaw. And we have speculated on how the NCAA may address this. Now, if the NCAA chooses to amend the bylaw rather than remove it altogether, if they eliminate the bylaw altogether, then any pay for play payments would be okay.

But if the NCAA chooses to amend the bylaw and if they follow Trump's lead in this executive order, the amendment may be to prohibit only third party pay for play payments. And I think that is what is likely to happen here. We know, we know the NCAA and in particular its President Charlie Baker want help from the federal government. They have been lobbying for it in the press. They have been lobbying for it down in Washington. It wouldn't surprise me at all if the NCAA follows the Trump lead in this executive order in amending that bylaw and explicitly prohibits only third party pay for play payments. Well, that's all well and good, but that's the future. Maybe the NCAA amends the rule that way. Maybe it does something else. Let's talk about what this "prohibition" on pay for play payments means. Right now, as I mentioned, an executive order is not law, but very clearly, President Trump is stating the policy of his administration on third party pay for play payments.

And what he says, and the keywords are they "should not be permitted by universities." Very clearly, Trump wants schools to implement and impose rules prohibiting pay for play payments by third parties at least until the NCAA takes action and changes its bylaws. And the very next section of the executive order talks about what his administration might do to further this. He says he is directing his Secretary of Education and his Attorney General and his Secretary of Health and Human Services to develop a plan to advance this policy, i.e. prohibiting third party pay for play payments and President Trump in doing so threatens to use all available regulatory enforcement and litigation mechanisms. And then he mentions a couple, specifically, one of

which really caught my eye. He says, "that includes federal funding decisions." Now, I don't think it is a large leap to say that by raising that, President Trump and his administration are overtly or implicitly threatening schools and saying, you need to prohibit these third party pay for play payments or perhaps face a loss of funding on some of these federal funding decisions.

And this of course, is a threat we have seen the Trump administration make before and follow through on before. So, it really would not surprise me at all to see schools reading this and deciding we need to take action, we need to implement these policies, or else we're going to risk losing certain funding. But that remains to be seen. Okay. Let's shift and talk very briefly now about section three titled Student Athlete Status, as I mentioned is the last section we're going to talk about. Here's what the executive order says in this section, which is actually very, very short. President Trump states, "The Secretary of Labor and the National Labor Relations Board shall determine and implement appropriate measures with respect to clarifying the status of collegiate athletes, including through guidance rules or other appropriate actions that will maximize the educational benefits and opportunities provided by higher education institutions through athletics."

Okay, not a ton there, but a couple important things and a couple really interesting things. I read this section that I just read aloud and reading between the lines, it seems to me that President Trump does not think it's a good idea for student athletes to become employees. If he did, I think he would've used different language. He may have even said it directly, so he doesn't think it's a good idea for them to come employees, but he does seem to recognize the need for some new classification for these student athletes. So he's directing the Secretary of Labor and the NLRB to issue guidance on this, to issue guidance, "clarifying the status of collegiate athletes." If their status was clear, at least in the Trump administration's mind, he would not be directing the Secretary of Labor and the National Labor Relations Board to issue guidance that would clarify it.

To me, this is going to be very, very interesting. Are we going to get guidance? Are we going to get rules? Are we going to get something that says what these student athletes are? Because right now we don't really know. They're not employees, but they're not not employees, they're not amateur athletes and students like they used to be. They are getting payments from schools from third parties and in some cases very, very significant payments. So I think President Trump is picking up on what we have said all along, which is there needs to be some new classification or at least some clarified classification for these student athletes or else we risk disparate decisions by regional NLRB boards, which we have already seen, which is going to create a big mess. In any event, it's going to be very interesting to see what, if anything comes out of this. And with that, I think we are out of time here today talking about President Trump's executive order. So I want to bring this discussion to a conclusion. I want to thank everyone for listening. If you have any thoughts or any comments about this series or about this episode in particular, please contact me directly. You can subscribe and listen to other Troutman Pepper Locke podcasts wherever you listen to podcasts, including on Apple, Google, and Spotify. Thank you for listening and stay safe.

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