



Planning for 2024: Legal Challenges to NIL

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Today's Menu

NIL Today

Student-Athlete Protections

What's on the NIL Docket in 2024

Non-NIL NCAA Legal Challenges

NIL TODAY (or at least this hour)



Preliminary Injunction

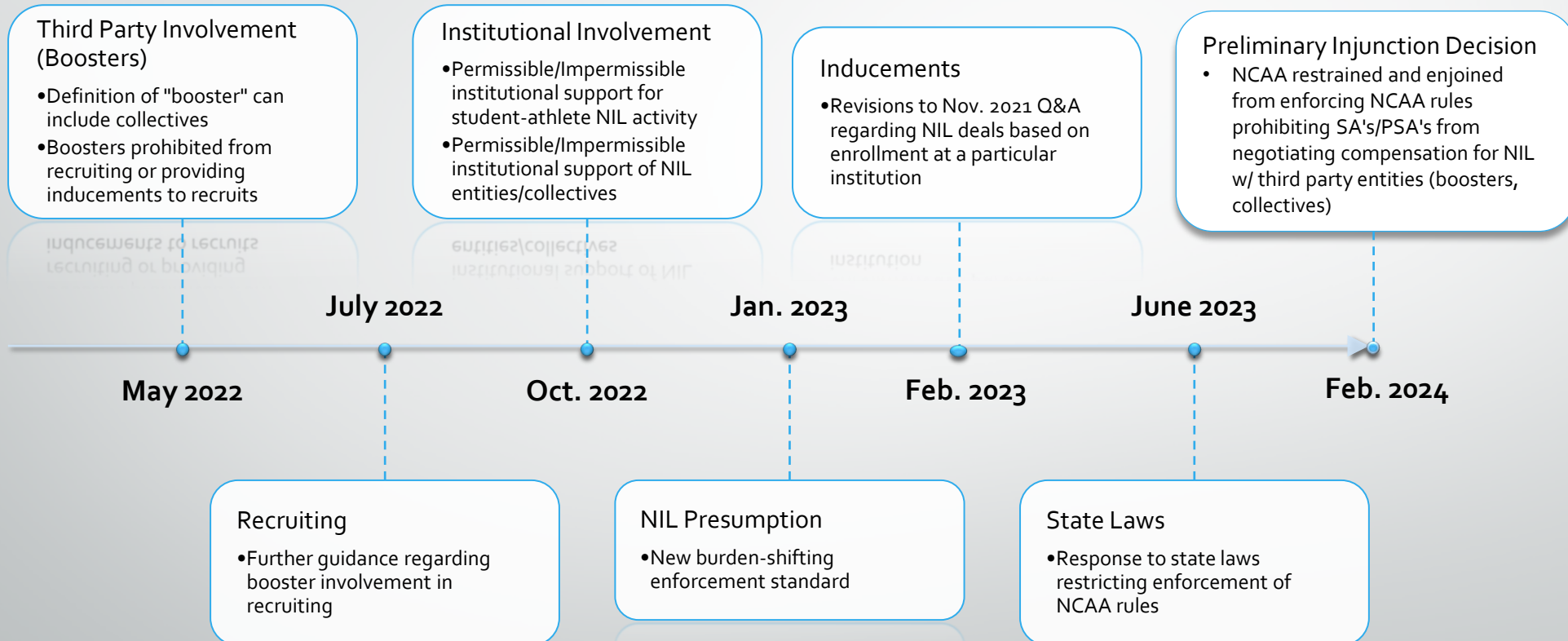


Current NCAA Guidance



Recent NCAA Infractions and Legal Challenges

NCAA Guidance under Interim NIL Policy



Tennessee / Virginia Preliminary Injunction

- Antitrust case brought by the State of Tennessee and the Commonwealth of Virginia against the NCAA
- Complaint requests Court issue a Temporary Restraining Order (TRO), then preliminary injunction, then permanent injunction "barring the NCAA from enforcing its NIL-recruiting ban or taking any other action to prevent prospective college athletes or transfer candidates from engaging in meaningful NIL discussion prior to enrollment..."
- TRO was denied February 6, 2024.
- Preliminary Injunction granted on February 23, 2024, enjoining enforcement of the NCAA's "NIL-recruiting ban."

NCAA Memo March 1, 2024



To NCAA member institutions:

NCAA staff have been working with the DI Board of Directors, Board of Governors and membership since a federal judge entered a preliminary injunction in the case brought by Tennessee and Virginia attorneys general.

And while we are eager to work with the attorneys general who brought the suit to reach a common understanding, we must move forward and provide as much clarity and stability as possible now.

In response to this latest order, the Division I Board of Directors directed NCAA enforcement staff to pause and not begin investigations involving third-party participation in NIL-related activities. There will be no penalty for conduct that occurs consistent with the injunction while the injunction is in place. I agree with this decision, while the progress toward long-term solutions is underway and while we await discussions with the attorneys general. In circumstances that are less than ideal, this at least gives the membership notice of the board's direction related to enforcement.

The judge's order also upheld three specific NCAA policies that remain in effect and will be enforced by NCAA staff:

- The prohibition on pay-for-play/payment for specific athletics performance.
- The prohibition on direct institutional payment for NIL.
- The quid pro quo requirement.

The proposals related to student-athlete protections adopted in January remain on track for an Aug. 1 effective date. Also, this injunction and the NCAA's response are effective for all of Division I.

I realize pausing NIL-related enforcement while these other bylaws are upheld by the injunction will raise significant questions on campuses. This is precisely why a DI meeting room, not a courtroom, is the best place to change NCAA policy. This is the only practical response to the injunction at this time, and we hope the attorneys will work with us to clarify next steps. Additionally, the DI Board, NIL working group and NCAA staff are fully aware of the need to bring about clarity for the role of institutions as soon as possible. In fact, the council introduced a proposal in January intended to clarify the role of schools in NIL matters. That proposal will be on the council and board agendas this April.

The reason I took this job is to work with all of you to bring about positive change for student-athletes. Guaranteed health care, guaranteed scholarships, guaranteed support to complete a degree — administrators and student-athletes made these positive changes reality in the last year. More needs to be done, and that's why I proposed to transform the Division I model while delivering more benefits to student-athletes. It's why the NIL working group and many other members are working on additional improvements. These are issues college sports leaders must resolve with student-athletes soon, and as NCAA president, I am committed to working with all stakeholders to find consensus and move forward.

A handwritten signature in black ink that reads "Charles Baker".

Charlie Baker, NCAA President

What now?

Follow your state law

No pay for play

No direct institutional NIL payment

Must have quid pro quo

Follow your institutional policy

Enforcement

NCAA Presumption Legislation – Jan 1, 2023

NCAA Bylaw 19.7.3 Violations Presumed in Select Cases

In cases involving NIL... the infraction process (including interpretive requests) shall **presume a violation occurred** if circumstantial information suggests that one or more parties engaged in impermissible conduct... 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 NIL activity complied with NCAA legislation

University of Miami Case – NIL Adjacent



Based on the specific facts developed during the investigation and the timing of the submission of the case to the Division I Committee on Infractions, the panel accepts the parties' submission. The investigation did not develop any facts directly linking activities around name, image and likeness to the prospects' recruitment to or decision to enroll at the University of Miami. During its review, however, the panel was troubled by the limited nature and severity of institutional penalties agreed-upon by Miami and the enforcement staff—namely, the absence of a disassociation of the involved booster. Further, this case was processed prior to the adoption of NCAA Bylaw 19.7.3, which went into effect on January 1, 2023, and presumes that a violation occurred in cases involving name, image and likeness offers, agreements and/or activities. Based on legislation in effect at the time of submission, the panel cannot presume that activities around name, image and likeness resulted in NCAA violations.

Although the parties asserted that a disassociation penalty would be inappropriate based on an impermissible meal and an impermissible contact, today's new NIL-related environment represents a new day. Boosters are involved with prospects and student-athletes in ways the NCAA membership has never seen or encountered. In that way, addressing impermissible booster conduct is critical, and the disassociation penalty presents an effective penalty available to the COI.

Considering the facts and circumstances in this case, however, the panel did not determine that the absence of a disassociation rendered the penalties manifestly unreasonable or the agreement to be against the best interests of the Association. Pursuant to Bylaw 19.10.6, this approved agreement has no precedential value. The COI will strongly consider disassociation penalties in future cases involving NIL-adjacent conduct.

- Case processed prior to the adoption of NCAA **Bylaw 19.7.3**
- Head women's basketball coach facilitated an introduction between John Ruiz (UM booster) and the Cavinder twins (prospects)
- Ruiz (booster) provided chef-prepared dinner at his home to prospects and family
- Violation of NCAA rules against publicity and using a booster in recruiting
- Based on legislation in effect at the time of submission, the panel could not presume that activities around NIL resulted in NCAA violations

*Florida
State University
Case
(Jan. 12, 2024)*



- Assistant football coach informed PSA and his family members about a booster meeting the PSA's official visit
- Assistant coach transported PSA and his family members to an off-campus location to meet with the booster
- Booster offered PSA an NIL deal valued at \$15,000 per month over one year
- Assistant coach did not attend meeting, but he provided PSA and his family members a ride back from the off-campus location
- Florida State and the NCAA reached a Negotiated Resolution, agreeing the infractions case was a Level II violation, including the following penalties:
 - Two-year probation period
 - \$5,000 financial penalty plus 1% of the football budget
 - Reduction of five football scholarships
 - Reduction of seven official paid visits
 - Suspension of assistant football coach for three games
 - Disassociation from booster for three-year period
 - Disassociation from collective for one-year period

COMING TO YOU AUGUST 1, 2024... STUDENT-ATHLETE PROTECTIONS



UNDERSTAND NEW NCAA NIL DISCLOSURE
REQUIREMENTS FOR STUDENT-ATHLETES
AND INSTITUTIONS



IMPLEMENT AN ENHANCED NCAA NIL
DISCLOSURE SYSTEM ON-CAMPUS



PREPARE FOR CAMPUS-WIDE
IMPLICATIONS OF EXPANDED NIL
DISCLOSURE REQUIREMENTS

NIL Student-Athlete Protections

- The Division I Council unanimously adopted a proposal to address “student-athlete protections” related to NIL effective **August 1, 2024**.
- There are four elements of student-athlete protections:
 1. Voluntary registration
 2. Disclosure requirements
 3. Standardized contracts
 4. Comprehensive NIL education

Disclosure Requirements

- SAs must disclose information related to NIL agreements exceeding \$600 in value no later than 30 days after entering the agreement
- Information includes:
 - Contact information for involved parties and service providers
 - Terms of the arrangement (services rendered, term length, compensation, and payment structure)
 - Compensation

Conversations On Campus

- Campus policy and state law related to SA NIL disclosures
- FERPA and FOIA impacts of NCAA's disclosure process
- Navigating NDAs in SA NIL contracts

THE 2024 NCAA NIL DOCKET: HOW TO PREPARE ON-CAMPUS



RECOGNIZE CROSS-CAMPUS IMPACT OF
EXPANDED INSTITUTIONAL INVOLVEMENT
IN NIL



FORECAST CHALLENGES WITH
INCREASING COMMUNICATIONS BETWEEN
NIL COLLECTIVES AND CAMPUS STAFF



PREPARE TO BRING NIL COLLECTIVES AND
OTHER THIRD-PARTIES UNDER THE NCAA
INFRACTIONS UMBRELLA

NIL Working Group Proposals

- To be introduced by NCAA DI Council with possible **April 2024** vote:
 - Relax restrictions on NIL support schools/third parties can provide to SAs
 - Entity "closely aligned" with school would be subject to NCAA rules
 - Remove restrictions governing communications between schools and NIL entities regarding enrolled SAs
 - Restrict all communications between prospects/IAWPs and NIL collectives

Conversations On-Campus

- Implications of recent preliminary injunction?
 - NIL rules remain:
 1. Prohibition of NIL agreements without quid pro quo
 2. Prohibition of "Pay for play"
 3. Prohibition of institutions directly providing NIL compensation
- Scope of NIL support Athletics wants to provide to SAs
- Triggering state athlete-agent law
- Keeping NIL third parties at an arm's length
- NCAA infractions impacts

NON-NIL NCAA LEGAL CHALLENGES



DARTMOUTH NLRB DECISION



ANTI-TRUST CONCERNS WITH
NCAA TRANSFER RULES



TITLE IX

Dartmouth NLRB Ruling

- The National Labor Relations Board in Region 01 (NLRB) recently decided that the men's basketball athletes at Dartmouth College are employees as defined by the National Labor Relations Act (NLRA)
- In reaching this finding, the NLRB relied on the common-law definition of employment, which “generally requires that the employer have the right to control the employee’s work, and that that work be performed in exchange for compensation.” *Columbia University*, 364 NLRB 1080 (2016)
- Benefits/compensation: apparel (\$3k/SA), comp ticket (\$1200/SA), travel/lodging/food, room/board/parking, academic support, career development, sports psych, nutrition, sports med/training, strength & conditioning, lifting/training facilities/gear, per diem, laundry, skill instruction, early read admission
 - Petitioner cites *O’Bannon v. NCAA*: “In *O’Bannon*, the Ninth Circuit explained that ‘the modern legal understanding of ‘commerce’ is broad’ and, therefore, ‘encompasses the transaction in which an athletic recruit exchanges his labor and NIL rights for a scholarship at a Division I school because it is undeniable that both parties to that exchange anticipate economic gain from it.’”

Dartmouth Takeaways

- Low bar for control
- Low bar for compensation
- Consider training staff and coaches regarding unfair labor practices

Antitrust - Transfer Rules Case

NCAA Bylaw 14.5.5.1 ("Transfer Eligibility Rule"):

- 14.4.4.1 General Rule. A transfer student from a four-year institution shall not be eligible for intercollegiate competition until the student has fulfilled an academic year of residence (see Bylaw 14.02.10) at the certifying institution unless the student qualifies for one of the transfer exceptions set forth in Bylaws 14.5.5.1.1, 14.5.5.1.2 or 14.5.5.1.3. A transfer student (other than one under disciplinary suspension per Bylaw 14.5.1.2) may qualify for an exception to the academic year of residence requirement provided they do not have an unfulfilled residence requirement at the institution from which they are transferring. (See Bylaw 14.1.11, for student-athletes participating in a recognized foreign exchange/study abroad program).

Antitrust - Transfer Rules Case

Dec. 7, 2023:

- Attorneys General of Ohio, Colorado, Illinois, New York, North Carolina, Tennessee, and West Virginia file antitrust action regarding the NCAA's Transfer Eligibility Rule.

Dec. 13, 2023:

- U.S. District Court for the Northern District of West Virginia issue a temporary restraining order (TRO) enjoining the NCAA from enforcing its Transfer Eligibility Rule.

Dec. 14, 2023:

- NCAA releases guidance regarding the TRO, stating that the season of competition legislation applies if a SA competes during the 14-day TRO. In other words, SA's who participate during TRO could burn a year of eligibility if ruling is reversed.

Dec. 18, 2023:

- Court grants motion to convert TRO into a preliminary injunction "that shall remain in effect until a full and final trial on the merits..."
- NCAA releases guidance acknowledging that it is enjoined from enforcing the Transfer Eligibility Rule for the remainder of the 2023-24 NCAA championship seasons.



Title IX

- Influx in Title IX Complaints
 - Champion Women - over 100 complaints to date
- Title IX and NIL
 - Treatment area? Publicity?
 - Financial Aid?
 - Significant assistance?
- University of Oregon Female Athletes Title IX lawsuit