



Developing a NIL policy: General statements (Part 2)

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In our publication [Developing a NIL policy: Five foundational pillars \(Part 1\)](#), we outlined an initial checklist for colleges and universities to get started when tackling a NIL policy that best reflects their institution in light of the National Collegiate Athletic Association's (NCAA) sharp pivot away from NIL prohibition (forgive our sports puns). Specifically, we recommended: (1) identifying your institution's key NIL stakeholders; (2) carefully reviewing your state's NIL law or executive order (if your state has one); (3) reviewing your athletic association's NIL policy; (4) identifying any policy or procedure already in place at your institution that may impact NIL; and (5) considering a NIL-related educational program for your campus.

In this second checklist for developing your NIL policy, we focus on our recommended general statements for consideration in your NIL policy. In considering language for your policy, we break it down by authority and recommend: (1) knowing the NCAA's expectations; (2) knowing your state law on NIL (if it has one); and (3) considering providing specific and descriptive examples for your staff and athletes of actions that would and would not violate your policy.

Again, before using this checklist, please note that the intricacies of NIL all but mandate that you consult with your policy team and counsel, as our checklist may not reflect your institution's priorities or approach to this complex issue. Additionally, while we recognize that the majority of existing state NIL laws share considerable similarities, our focus is on [Ohio Executive Order 2021-10D](#). We also work with several athletic associations, but focus here on the NCAA.

1. Know the NCAA's expectations

In Part 1, we underscored the importance of knowing your athletic conference's expectations – and this bears repeating. Here, we

dive into the NCAA limits on NIL. The NCAA expectations are minimal, but important to review while drafting your policy to avoid any real (or apparent) conflicts with those expectations.

First, the NCAA still prohibits pay for play. Policy language cannot allow NIL deals that incentivize a particular outcome or performance. Certainly, high performing athletes may have more NIL offers, but policy language cannot, for example, allow withdrawal of deals for poor performance or provide consideration only after wins. For example, a car dealership cannot make a deal with a football player to provide free weekly use of a car, limited to only weeks after the football team wins.

Second, NCAA recruiting bylaws still apply. Policy language cannot allow NIL to be used as a recruiting inducement. It is currently a hot topic that schools and states with permissive NIL laws and policies may be more competitive in recruiting athletes. However, it is still an NCAA violation for coaches and institutions to promise prospective athletes NIL deals. For example, an athlete may choose to attend a school where the school has a team NIL deal with a corporation that allows all the athletes on the track and field team to share in NIL for the sale of jerseys with their names on them. However, a policy may not allow the college to offer an NIL deal for sale of jerseys to only one prospective track and field athlete if that athlete attends the school, to the exclusion of the rest of the team.

Third, subject to your state's law, policy language cannot allow compensation for work not performed. The athlete must give *something* in return for compensation. For example, policy language cannot allow a NIL deal where the athlete is provided with a year's worth of burritos for making five videos endorsing the burritos, but allows for the athlete to still have the burritos if the athlete does not make the videos.

Fourth, subject to your state's law, policy language cannot be conditioned on enrollment in a particular college. Similar to the second prohibition above, a college NIL policy may not allow for NIL deals that require a specific athlete to attend that college in order to enter the deal. As in our track and field team example above, a college may have a team apparel NIL deal that is attractive to all prospective athletes of the track and field team because it is available to all track and field athletes, but may not allow for NIL deals in which a deal is provided to one specific track and field athlete only if that athlete attends the college.

Fifth and finally, subject to your state's law, policy language cannot allow compensation for any past, present or future athletic participation or achievement. However, athletic performance may enhance an athlete's NIL value, but athletic performance may not be the "consideration" for NIL compensation. For example, a volleyball player who enters a NIL deal with a sports drink company for a discount on sports drinks in exchange for a couple social media posts about the product, who then makes the social media posts, cannot lose the car because the player becomes injured and cannot play the remainder of the season. Likewise, the same volleyball player could not enter into an NIL deal to receive a car in exchange for the prior season's performance at the championships.

2. Know your state law

As mentioned above, we practice in Ohio, which has addressed athlete NIL pursuant to an executive order. We will be using Ohio Executive Order 2021-10D (link above) as an example for following your state law or regulation if your state has one in place (not all do, visit our [NIL Resource Center to see our interactive map of state NIL policy.](#))

In Ohio, for example, Ohio's Executive Order prohibits colleges from putting in rules, requirements, standards or other limitations that would prevent an athlete from earning compensation from NIL (Ohio Executive Order, item 1). Essentially, Ohio makes it clear that institution policies must allow for students to participate in NIL.

Interestingly, Ohio prohibits colleges from affecting an athlete's scholarship eligibility or renewal based on an athlete's NIL earnings (Ohio Executive Order, item 1). This is fascinating because, while colleges and universities cannot expressly tie scholarship eligibility to NIL earnings, NIL earnings certainly impact student financial aid, which may impact other eligibility. The language in Ohio indicates that, even where an athlete has signed a financially-significant NIL deal, the college or university may not consider those earnings in even a needs-based college or university scholarship.

Finally, Ohio prohibits colleges and universities from entering into NIL activities with prospective athletes (Ohio Executive Order,

item 2A). This is consistent with the NCAA's language on recruiting bylaws, discussed above.

3. Additional considerations: Definitions and examples

Because NIL is new for everyone right now, we recommend considering adding clear definitions for frequently-used words and descriptive examples. This will help avoid ambiguities that might arise in the implementation of an NIL policy. For example, and will be explored in a later article, the term "official team activity" will be important to define because Ohio allows schools to prohibit athletes from participating in NIL deals while engaged in official team activities. But what is considered an "official team activity?" Is it only practices and games? Does it include workouts? What about travel? How this term is defined will impact when athletes can do NIL activities.

Below is a list of definitions institutions should consider integrating into their NIL policy:

- Compensation
- NIL activities
- Professional representation
- Athletic participation
- Achievement
- Official team activity
- Team travel

As always, you will want to ensure that your legal counsel has reviewed your definitions to ensure that they do not conflict with definitions in other policies.

This publication is part of Bricker & Eckler's continuing series, "Developing a NIL policy." To view additional publications from this series, click the links below or visit our [NIL Resource Center](#).

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