Developing a NIL policy: Disclosure and review of NIL agreements (Part 4)

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In our Name, Image and Likeness (NIL) checklist series, we've so far reviewed the foundational pillars that support your institution's approach to NIL, the general considerations provided by state laws, regulations or executive orders, and, most recently, how to navigate athlete access to your intellectual property (IP) portfolio and physical facilities. In this installment, we tackle how your institution can – and should – review proposed NIL agreements involving your athletes.

Unlike issues surrounding IP and facilities usage, state NIL laws offer more clarity with respect to the role of the institution in reviewing draft NIL agreements. For instance, in Ohio, while Executive Order 2021-10D requires that an institution not "interfere with or prevent" an athlete from participating both in their sport and NIL opportunities, it permits an institution a modest amount of involvement.

More specifically, Ohio's NIL law requires athletes to "disclose the proposed contract to an "official" of the institution "for review." Review, of course, is subject to myriad interpretations and, notably, there is no review period of time stated (Pennsylvania's NIL law, for example, requires athletes to disclose proposed NIL agreements at least seven days in advance of execution). From there, the institution is permitted to identify conflicts "between the proposed verbal or written contract" and "any existing provisions of a contract to which the institution" is a party. To the extent such conflicts exist, it is the institution's obligation to communicate that to the athlete, after which the executive order permits the athlete to negotiate with their potential business partner to work out an alternative.

How does all of this come together in practice? For most, it means ensuring that your institution either has a designated point

person to review proposed NIL agreements, utilizing software or an app or outsourcing the function to a third party completely. Given that there is no shortage of apps and third parties now operating in the athletic-compliance space, we'll focus on reviews conducted by individuals.

While it may seem rudimentary, the first question in the review process is necessarily: What am I specifically reviewing for? The review is meant to encompass a number of simultaneous considerations. First, whether the proposed agreement runs afoul of the National Collegiate Athletic Association's (NCAA) prohibitions on "pay-for-play" or impermissible inducements. Second, that it fits into your state's NIL law. In Ohio, athletes may not display a sponsor's product during "official team activities" (you defined that phrase in your policy, right?) and athletes are prohibited from entering into contracts with sponsors that are associated with a number of broadly defined industries (controlled substances, vapor products, adult entertainment, etc.). Third, whether the proposed agreement presents a conflict with an agreement already in place with the institution.

This third point begs a question: How do I spot a potential conflict? In large part, it will turn on the information that you get from the athlete with respect to the deal and how that information can be searched across your system of records. At a minimum, gather:

- The names of the business or individual contracting with the athlete
- A point of contact
- Contact information
- The type of endorsement (e.g., autograph signings, social media posts, etc.)
- The method of payment
- Agreed upon value
- Whether an agent was involved
- A copy of the written agreement itself

In the process of gathering such information, institutions are free to have athletes attest that they have read and understood your policies, that the agreement is neither pay-for-play nor an impermissible inducement, and that the information provided by the athlete is true, accurate and complete.

Once you have that information, it turns on how contracts are managed at your institution. If they are centrally managed, that's where you should start to identify potential conflicts. If it's more ad hoc (and it often is), it may require more hands-on searching. Regardless, the key point is being able to identify provisions that may put the institution's existing agreements at odds with the athlete's desired agreement, such as competing sponsorship. To the extent such contractual conflicts can be identified in advance (e.g., a list of the brands with which your institution has offered some amount of exclusivity rights) and made available to your athletes, all the better in the long run.

If a conflict is identified, be sure to notify the impacted athlete as soon as possible (and in accordance with the timing of any applicable state law), to allow for any negotiations to take place. Remember, brands are going to want to move quickly and unnecessary delay from a compliance perspective may lead to athletes signing deals and asking for institutional forgiveness or athletes missing out on deals, neither of which leave the institution in a good place. To that end, consider how your institution will respond to athletes who either fail to disclose or proceed with signing a deal before the institution has a chance to complete its review.

Your institution has a role in the review of NIL agreements, but it is critical to strike the balance between ensuring that the institution's equities are protected with not interfering with the rights of athletes to pursue NIL opportunities. Create a formal process for disclosure and ensure that the individuals – or app, software or third party platform – are properly trained on what a review can and must entail.

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