

## THE COLLEGE STUDENT ATHLETICS POLICY LANDSCAPE IN 2024

### Background

For years, mounting pressure from various corners has impacted the relationship between college student-athletes and their institutions of higher education. Much of this pressure has been directed at the National Collegiate Athletic Association (NCAA), whose governance structure relies upon representatives of member institutions to establish and maintain the rules of this relationship. Central to this scrutiny is the challenge to the NCAA's rules that provide national uniformity around benefits available to student-athletes. Beginning in 2009, the NCAA and the Collegiate Licensing Company mounted a multiyear defense to a lawsuit brought by a former University of California, Los Angeles men's basketball player regarding student-athlete publicity rights and alleged violations of the Sherman Antitrust Act.<sup>1</sup> By 2015, the National Labor Relations Board (NLRB) was disposing a petition by football players at Northwestern University seeking to unionize.

In 2021, the Supreme Court's decision in *NCAA v. Alston* severely limited the NCAA's ability to self-regulate "education-related benefits" offered by institutions to their student-athletes.<sup>2</sup> The plaintiffs in *Johnson v. NCAA* case, pending in federal district court in Pennsylvania against the NCAA and numerous Division I schools, have just been given the "green light" by an appeals court to continue with their claims that Division I student-athletes, including walk-ons and those in non-revenue sports, are employees of their institutions under the Fair Labor Standards Act and therefore entitled to pay, overtime, and the protections of other work rules.<sup>3</sup> This follows a February 2024 ruling by the NLRB regional director in Boston ruled that players on Dartmouth's men's basketball team, who do not receive scholarships for their participation in sport, are employees under the National Labor Relations Act and eligible to be represented by a union.<sup>4</sup>

Meanwhile, states have sought to address the broader issue of student-athletes' right to earn compensation while competing on all NCAA division teams, especially by profiting from their name, image, and likeness (NIL). In 2021, all three NCAA divisions passed a policy that allowed student-athletes to benefit from their NIL. As of 2023, 29 states had passed bills to allow for NIL, and many also restrict the NCAA's enforcement of rules its members agreed to follow, creating an inconsistent landscape for student-athletes and institutions. Because the NCAA does not have authority over state laws, the lack of a consistent national framework has led to a patchwork system where student-athletes, institutions, and conferences are caught up in what has been widely referred to as the "Wild West of college athletics."

### The Legislative Landscape

#### Student-Athlete Compensation

The NCAA recently sought Congress' support in addressing the current patchwork of state laws governing NIL. Several members of Congress have introduced federal NIL bills, with some proposals receiving more attention than others. Additionally, because of recent NLRB rulings, court cases, and action by states' attorneys general, the NCAA is also looking to Congress to pass legislation that would ensure student-athletes aren't employees of their institutions and create limited liability protections so college sports can make and enforce reasonable rules for national competition.

One effort to address NIL policy on the federal level is a bicameral, bipartisan working group, which includes Reps. Gus Bilirakis (R-FL) and Debbie Dingell (D-MI) and Sen. Ben Ray Lujan (D-NM). The group released a discussion draft in May 2023 of the Fairness, Accountability, and Integrity in Representation (FAIR) of College

Sports Act. The group was formed with the intention of addressing NIL, protecting athletes, and preserving collegiate sports. This bill would allow student-athletes to profit from their NIL, ban boosters or collectives from offering inducements, require transparency in NIL agreements, and establish an independent commission to oversee the national NIL process.

In July 2023, Sens. Cory Booker (D-NJ), Jerry Moran (R-KS), and Richard Blumenthal (D-CT)<sup>5</sup> released a bipartisan working draft of the College Athletes Protection and Compensation Act, which is a revised version of the College Athletes Bill of Rights Act introduced during the 117<sup>th</sup> Congress.<sup>6</sup> In August 2023, Sen. Ted Cruz (R-TX) also released a discussion draft bill to “codify NIL rights for athletes” and “provide legal certainty for college athletics.”<sup>7</sup> Though the bill differs from the FAIR College Sports Act, it also includes guardrails for student-athletes and provides more guidance for institutions and athletics programs. Both Rep. Bilirakis and Sen. Cruz’s draft bills include provisions that address the employment status of student-athletes as well as provide limited liability protections for schools, conferences, and associations. On March 12, 2024, Sen. Cruz hosted a roundtable with Sens. Moran and Blumenthal and other senators to facilitate conversation on the future of college athletics, covering topics such as governance, NIL, and student-athlete compensation. The roundtable brought together former Alabama football coach Nick Saban, leaders from athletics programs and conferences, and college athletes.

## Booster Collectives

Policymakers are also raising questions about alumni collectives. Alumni collectives are groups of alumni or friends of an institution that independently raise money to sponsor student-athlete NIL deals, with the intended goal of enticing the student to participate in the institution’s athletics program. Though not officially connected to the institution, alumni collectives vary to the extent that their actions are directly or indirectly endorsed by their institution. As collectives have grown in popularity and influence, so have serious concerns about an uneven playing field for athletics programs and the potential for student-athletes to be exploited financially.

While institutional experiences vary, there are numerous examples of collectives that are placing student-athletes and institutions in difficult positions. Further, there are growing concerns that the inequities between how NIL and alumni collectives treat men and women may violate Title IX. This means that institutions could be held liable for the actions of NIL collectives if they are found to be creating unequal opportunities for male and female athletes.<sup>8</sup>

The NCAA has been examining the role collectives play in athletics departments, particularly the growing practice of a program or collective attempting to lure student-athletes away from other programs, known as inducement. Although the NCAA strictly prohibits third parties from offering non-scholarship payments to induce athletes to attend a school, enforcing this rule is difficult. This is because collectives and athletic departments are often loosely connected, and some ongoing lawsuits and new state laws seek to prevent the NCAA from enforcing this prohibition.

In late January, it was reported that the NCAA was investigating an alumni collective affiliated with the University of Tennessee, Knoxville, including allegations that the collective flew an active football recruit on a private plane.<sup>9</sup> Certain state attorneys general filed a lawsuit against the NCAA challenging its NIL policy, and a federal preliminary injunction issued in March 2024 limits the NCAA’s authority to enforce NIL rules related to recruiting while the case is pending.

## Student-Athletes as Employees

There is widespread concern among colleges and universities about classifying student-athletes as employees, paying them as such (including overtime pay), and adhering to Department of Labor regulations. In 2022, ACE filed a brief with the U.S. Court of Appeals for Third Circuit in the *Johnson v. NCAA* case mentioned above.<sup>10</sup> Though the athletes would still take classes as students, their relationship to the institution and their coach would be dramatically altered in ways that would jeopardize the scholar-athlete model. This approach raises concerns about the potential loss of focus on academics and the overall experience of student-athletes beyond money.

Colleges and universities will face several challenges if student-athletes must be considered employees. Chief among them is the significant cost increase for schools to employ all their current student-athletes and the likely reduction in rosters or sports offered on campuses. The vast majority of U.S. Olympians get their start and train in NCAA athletics programs, and a reduction in collegiate sports would have drastic impact on U.S. Olympic teams. Similarly, the cost of employing student-athletes would likely negatively impact women's college sports, which do not generate nearly as much revenue as some Division I football and men's basketball programs. Additionally, many immigration experts believe an employment model would all but eliminate opportunities for international student-athletes.

Transitioning student athletes to employees would lead to serious financial challenges for institutions, presenting new direct and indirect costs to colleges and universities. Direct compensation (e.g., hourly pay or salary) would be extremely difficult to accommodate under current budgeting for most institutions, because, with few exceptions, most athletics programs produce no net revenue for the institution. According to data from the NCAA, in 2019, only 25 out of 130 football Bowl Subdivision schools generated athletics revenues that exceeded their athletics expenses. In the same year, there were no Football Championship Subdivision schools bringing in more athletics revenues than their athletics expenses, so the financial impact and resulting loss of access would be felt by nearly all schools across all NCAA divisions.<sup>11</sup>

Beyond direct compensation costs, if student-athletes are mandated to be treated as employees, institutions would be required to ensure that student-athletes meet basic federal and state employment requirements. Such a mandate would result in more employees at the institution and more requirements for the institution to meet, leading to a higher burden on human resources staff and compliance officers.

There is also wide variation in the size of athletics programs at institutions, even at Division I schools. For example, a "Power 4" institution in conferences like the Southeastern Conference or Big Ten has considerably more resources than an institution in the Mid-American or Sun Belt conferences. Faced with the financial strain of classifying student-athletes as employees, institutions might be forced to make the difficult decisions of cutting entire sports programs, such as wrestling or men's gymnastics, or eliminating athletics departments altogether.

Though not directly tied to treating student-athletes as employees, other recent developments in courts are rapidly shifting the landscape for college athletics. In May 2024, the NCAA and the five Division I conferences with autonomy tentatively agreed to a settlement in a lawsuit brought in 2021 by former college athletes, *Grant House v. NCAA*. In the lawsuit, the former athletes sued the NCAA for not allowing student-athlete compensation for their NIL prior to 2021.<sup>12</sup> As part of the settlement, the NCAA would pay out over \$2.7 billion in damages to the plaintiffs, with \$1.6 billion of the settlement fund being paid for by the NCAA reducing annual distribution funds to institutions. The proposed settlement also includes an injunctive settlement by which additional benefits and NIL licensing payments could be provided to student-athletes through a funding pool each school could develop through athletic department revenue. The proposed injunction is expected to last at least 10 years.<sup>13</sup>

### Collective Bargaining & Unionization

In February 2024, the Boston regional office of the NLRB<sup>14</sup> ruled that members of Dartmouth's men's basketball team should be treated as employees and allowed to unionize under the National Labor Relations Act.<sup>15</sup> Under this model, a student-athlete would be reclassified as an employee of the institution under the Fair Labor Standards Act, making their coach an employer supervisor. Although this measure enjoys some congressional support, public proponents remain almost exclusively on the Democratic side of the aisle. Sens. Chris Murphy (D-CT), Bernie Sanders (I-VT), and Elizabeth Warren (D-MA) recently introduced the College Athlete Right to Organize Act.<sup>16</sup> This bill would mandate that student-athletes be treated as employees at public and private institutions under the National Labor Relations Act, as well as have the right to join or establish a labor union either by sport, within their institution, or within their athletic conference. This legislation is backed by several leading labor unions for professional sports as well as other larger unions such as the American Association of University Professors, the AFL-CIO, and Service Employees International Union.

## Other Issues in College Student Athletics

### Transfer Portal

In 2018, the NCAA created the transfer portal in response to growing demand for a common method for student-athletes to express interest in transferring, receive offers, and ultimately transfer between institutions and athletics programs.<sup>17</sup> In addition, the NCAA adopted new transfer rules that allowed student-athletes in all sports to transfer once and be immediately eligible upon transfer. Several states took exception to this “one-time” transfer policy and secured an injunction that allows student-athletes to transfer as many times as they like without eligibility consequences. The NCAA reached a settlement with the state attorneys general and the United States Department of Justice that leaves academic eligibility rules intact. From August 2021 to June 2022, just over 20,000 student-athletes entered the transfer portal. Of those students, over 12,000 ended up transferring to another institution. This represents a major change for college athletics.<sup>18</sup> Yet it also reflects a broader trend in higher education in which transferring institutions is increasingly common among students and encouraged by institutions.

### Transgender Athletes

In 2010, the NCAA established a voluntary policy covering the participation of transgender athletes.<sup>19</sup> In 2022, the NCAA revised this policy to better align with the Olympic Movement. This updated policy allows for transgender student-athlete participation for each sport to be determined by the policy for the national governing body (NGB) of that sport. If there is no NGB policy for a sport, it would then be determined by the policy for that sport’s international federation. According to the NCAA, this “sport-by-sport approach preserves opportunity for transgender student-athletes while balancing fairness, inclusion and safety for all who compete.”<sup>20</sup> The Department of Education has been expected to release new Title IX regulations related to transgender athlete participation this year, but these appear to be on hold.

### Safe Harbor

As noted above, as a result of actions taken by state legislators and attorneys general, the NCAA has now been enjoined from enforcing its NIL recruiting ban on student-athletes<sup>21</sup> so the association has announced it will no longer seek to do so.<sup>22</sup> This is a serious concern, as the NCAA is currently encountering challenges to its work to protect student-athletes and maintain the uniqueness of college athletics versus professional sports. Because of this, the NCAA is asking Congress to be granted safe harbor from pending and future litigation, allowing the NCAA protection to set guidelines for student-athletes, institutions, and alumni collectives. This concept does exist in some of the current NIL bills being discussed in Congress, and it is a key priority for the NCAA.<sup>23</sup>

### Gambling

A relatively new issue is how higher education institutions should interact with sports gambling companies. After the Supreme Court struck down the Professional and Amateur Sports Protection Act in 2018, many states moved to allow gambling on professional and college sports within their states. Today, 38 states allow gambling on sports, with varying restrictions by state.<sup>24</sup> Many states allow gambling on college sports with no restrictions, and others only restrict betting on college athletics for in-state schools but allow gambling on out-of-state athletics.<sup>25</sup>

Considering the growing popularity of college sports gambling, some higher education institutions now have direct partnerships with betting companies, and several institutions have commercial partnerships with sports gambling businesses.<sup>26</sup> Many of these arrangements center on advertising rights at games and facilities, as well as revenue-sharing agreements when a customer uses their betting service with an institution’s promo code.<sup>27</sup>

The NCAA has guidelines and policies to protect student-athletes in this area. Currently, student-athletes, coaches, and athletic administrators are barred from participating in any sports gambling, and those found doing so face consequences. If a student-athlete is found to have gambled on their own games or assisted others in doing so, they will be permanently banned from all NCAA sport eligibility. Other regulations keep a student-athlete from wagering on other sports they may not be participating in, including partial loss of eligibility with the potential for

reinstatement after a period of time.<sup>28</sup> Coaches and administrators violating NCAA bylaws are subject to the infractions process. The NCAA and many conferences also contract with integrity services companies to have better visibility about potential criminal conduct influencing the outcome of competitions. The NCAA is also advocating for existing state sports betting laws and regulations to be updated to ban “prop bets” focused on individual athlete performance, protect student-athletes from harassment or coercion, address the negative impacts of problem gambling, and protect the integrity of NCAA competition.

## Health Care Coverage

Higher education institutions have long dealt with challenges in offering health care and health insurance to student-athletes. The NCAA requires member institutions to confirm that student-athletes hold an accident coverage policy, which provides insurance for sports-related injuries incurred during practice or play but may not cover all treatment costs. Additionally, the NCAA membership also recently passed rules that require all Division I schools to pay for the out-of-pocket costs of student-athletes during their athletic participation, provide access to mental health services, and pay for athletically related health care for up to two years after they graduate. The NCAA has secured insurance coverage that student-athletes from all divisions can utilize to pay for post-eligibility athletically related health care.

## Conclusion

The evolving landscape of student-athlete compensation, particularly with the advent of NIL, will continue to be a high-profile and challenging issue for colleges and universities in 2024. Moving forward, higher education institutions, policymakers, and the public need to be aware of the serious implications of shifts within the student athletics landscape. Concerns are also developing around treating student-athletes as employees of institutions. This approach could cripple athletics programs at many institutions, likely forcing them to cut sports entirely. Further congressional action is needed to establish guardrails for student-athletes and create a framework for the NCAA to enforce their own rules for college athletics.

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<sup>1</sup> O’Bannon v. NCAA, No. 14-16601 (9th Cir., 2015). Retrieved from <https://law.justia.com/cases/federal/appellate-courts/ca9/14-16601/14-16601-2015-09-30.html>

<sup>2</sup> NCAA v. Alston, No. 20–512 (Supreme Court of the United States, 2021). Retrieved from [https://www.supremecourt.gov/opinions/20pdf/20-512\\_gfbh.pdf](https://www.supremecourt.gov/opinions/20pdf/20-512_gfbh.pdf)

<sup>3</sup> Johnson v. NCAA, No. 22-1223. (3rd Cir. 2024). Retrieved from <https://www2.ca3.uscourts.gov/opinarch/221223p.pdf>

<sup>4</sup> National Labor Relations Board, Trustees of Dartmouth College, Case No. 01-RC-325633. Retrieved from <https://www.nlr.gov/case/01-RC-325633>

<sup>5</sup> Senator Cory Booker (2023). Booker, Blumenthal, Moran Announce Bipartisan Discussion Draft of Legislation to Protect College Athletes’ Health, Education, & Economic Rights. Retrieved from <https://www.booker.senate.gov/news/press/booker-blumenthal-moran-announce-bipartisan-discussion-draft-of-legislation-to-protect-college-athletes-health-education-and-economic-rights>

<sup>6</sup> College Athlete Protection and Compensation Act. [https://www.booker.senate.gov/imo/media/doc/college\\_athletes\\_protection\\_and\\_compensation\\_act\\_of\\_2023.pdf](https://www.booker.senate.gov/imo/media/doc/college_athletes_protection_and_compensation_act_of_2023.pdf)

<sup>7</sup> Senator Ted Cruz (2023). Sen. Cruz releases discussion draft of bill to codify NIL rights for athletes, provide legal certainty for college athletics. <https://www.cruz.senate.gov/newsroom/press-releases/sen-cruz-releases-discussion-draft-of-bill-to-codify-nil-rights-for-athletes-provide-legal-certainty-for-college-athletics>

<sup>8</sup> Kaitlin Tholl (2024). Written Testimony to U.S. House Committee on Energy & Commerce. [https://d1dth6e84htgma.cloudfront.net/Tholl\\_Testimony\\_IDC\\_NIL\\_Hearing\\_2024\\_01\\_18\\_1\\_bb9e513678.pdf](https://d1dth6e84htgma.cloudfront.net/Tholl_Testimony_IDC_NIL_Hearing_2024_01_18_1_bb9e513678.pdf)

<sup>9</sup> Michael Schmidt, David Fahrenthold, & Billy Witz (2024). NCAA inquiry takes on growing role of booster groups. The New York Times. Retrieved from <https://www.nytimes.com/2024/01/30/us/ncaa-tennessee-booster-group-violation.html>

<sup>10</sup> American Council on Education (2023). <https://www.acenet.edu/Documents/Amicus-Brief-Third-Circuit-Johnson-v-NCAA-060722.pdf>

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- <sup>11</sup> NCAA (2019). 15-year trends in Division I athletics finances. [https://ncaaorg.s3.amazonaws.com/research/Finances/2020RES\\_D1-RevExp\\_Report.pdf](https://ncaaorg.s3.amazonaws.com/research/Finances/2020RES_D1-RevExp_Report.pdf)
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