

NCAA IP Shift 'One Step Forward, Two Steps Back' For Players

By **Zachary Zagger**

Law360 (April 30, 2020, 5:30 PM EDT) -- The NCAA's shift toward allowing college athletes to be paid for endorsements and other uses of their names, images and likenesses may wind up being a minor concession if the organization succeeds in its push to block legislation and litigation seeking further reforms, particularly if it comes with any protection from antitrust scrutiny, experts say.

The **organization said Wednesday** that its board of governors now supports the idea of college athletes being paid "for third-party endorsements both related to and separate from athletics," a significant change to the current system that prohibits athletes from capitalizing on their popularity while in school.

But at the same time, the board said the organization will continue to lobby Congress to stop states from enacting their own bills to expand athletes' publicity rights and to give the organization a "safe harbor" from litigation while it implements the new system.

The move comes after a series of lawsuits in recent years have challenged such restrictions and as states across the country are considering legislative measures to allow college athletes to be paid for endorsements. California **enacted one such bill** last year.

"Indeed, our efforts over the years to improve college athletes' experiences have often been met with increased litigation and challenges that significantly limit the NCAA's ability to address those needs and opportunities," NCAA President Mark Emmert said in a conference call with reporters. "And for that reason, we are going to continue to engage Congress to help us navigate these challenges. It is clear we need Congress' help in all of this."

Experts said that effort, if successful, would far outweigh any benefits from the reforms announced Wednesday, particularly if the NCAA is able to get some sort of antitrust exemption or protection from Congress. They noted that past lawsuits and proposed state laws have not stood in the way of reform, but have in fact pushed the NCAA to come to the table.

"The one thing that has been true of the NCAA, and it has been so for a long time, is that as a trade association, the NCAA will make the smallest reforms possible to keep lawsuits off its back and to mitigate bad public relations," said Marc Edelman, a professor at Baruch College of the City University of New York who has published scholarship on regulation of the NCAA.

"Today's reforms are definitely a small step forward," he said. But if the NCAA is able to obtain the protections it wants, it could be "one step forward and two steps back."

The NCAA is pushing for federal legislation that would preempt the **various state laws** being considered, some of which call for more significant reforms such as forcing schools to **share ticket revenue** with athletes. The organization has said a patchwork of state laws would make nationwide college sports impracticable.

"I think it makes sense to give them space to work with Congress for a national [name, image and likeness] law," said attorney Paul McDonald, who has brought suits against schools and the NCAA alleging athletes should be paid as employees. "That said, I think it

makes the most sense for the NCAA to enter into some global agreement with the relevant states to, perhaps, delay the effective date of their respective laws, with conditions, rather than to involve Congress in that piece."

As for a safe harbor, attorney Luke Fedlam of Porter Wright Morris & Arthur LLP said it would be beneficial so long as it is limited in duration and scope.

"This is such a significant change," said Fedlam, who advises athletes transitioning from college to the pros. "When we see it get implemented, there is going to have to be a period of time to see how this all works" between the NCAA, athletes, schools and brands.

Fedlam said the NCAA ideally would want to be able to implement the new system "without the threat of litigation."

"There really would be benefits all around and allow the NCAA to implement the new rules quickly and smoothly," he said.

But a report by an NCAA working group considered by the board of governors said "impediments posed by continuing antitrust litigation" will harm the NCAA's "ability to investigate and adopt common and adequate solutions to pressing issues facing college athletics," suggesting the NCAA is looking for broader antitrust protections.

Yet, in the past, the NCAA has only made incremental reforms, including ensuring that athletes have enough to eat during the school year and having schools pay for their parents to attend more games. Those have come amid antitrust suits such as the 2015 O'Bannon v. NCAA case, which held that the NCAA's rules capping what schools could give college athletes as a scholarship were anti-competitive.

"The reality is that a huge trade association with incredible bargaining power is exactly the type of organization that needs to be reviewed under antitrust law," Edelman, the Baruch College professor, said.

Jeffrey Kessler, a partner at Winston & Strawn LLP who is representing college athletes in an **antitrust challenge** to the NCAA that is currently on **appeal to the Ninth Circuit**, said antitrust protection as part of these changes would "have a worse outcome for athletes than if the NCAA did nothing at all."

"Only the NCAA can argue with a straight face that it is doing something for the welfare of athletes at the same time they oppose the remedy that has worked in their benefit," Kessler said.

--Editing by Kelly Duncan and Alanna Weissman.

Update: This story has been updated with information about an NCAA working group report.