

PROTECTING YOUR POSSIBILITIES PODCAST WITH LUKE FEDLAM

Episode 22: Entrepreneurship in the Name Image & Likeness Environment | Dec. 15, 2020

The following is a transcription of the audio podcast recording. It is largely accurate but in some cases it is incomplete or inaccurate due to inaudible passages or transcription errors.

Luke: I'm sports attorney Luke Fedlam, and welcome to the Protecting Your Possibilities podcast. Each conversation we focus on sharing information and having conversations around how athletes can best educate and protect themselves or their life outside of their sports.

Thank you so much for tuning in to the protecting your possibilities podcast. I'm your host, Luke Fedlam. Excited to be here today. And I know I say that just about every week. But it's true. I'm excited to have these conversations. Sometimes it's conversations with other people. Sometimes it's just me talking. But this topic is something that means so much to me. The idea of protecting your possibilities. The idea that we all, as human beings have these possibilities in front of us. And I just really feel like my job, my goal, my passion and excitement is trying to protect that possibility so that all of us have that opportunity to have a positive impact on ourselves, our families and our communities.

So the topic for today is the idea of entrepreneurship in the name, image and likeness environment. And I'm really excited to dive into this a little bit more today. Because I feel like, you know, we all know that name, image and likeness changes are coming to college sports. And 2021, when some form of these rules go into effect, it is going to be fascinating to see how this all plays out. My desire is to try to educate student athletes as best as possible. And those other stakeholder groups around them from parents, to athletic administrators, coaches, to help them understand how best to protect, how best to educate, the student athletes that they care about. And one of the things that I think has really gone under discussed is the idea of entrepreneurship, as it relates to this name, image and likeness environment.

So we know just to kind of set the stage for everyone, we and I say that, you know I've gotten used to this you know whole concept of setting the stage or resetting the stage of for those of you who are familiar with Clubhouse, I'm on Clubhouse, you could follow me on there, Luke Fedlam. And and they always kind of say, Okay, let's reset the stage. And so I apologize for translating that over to the podcast. But let's set the stage for a second, let's talk about where things stand with name, image and likeness.

And in the name image and likeness environment right now, here's where things are, we are expecting the NCAA Board of Governors to approve their proposed rules for name, image and likeness at their meeting in mid-late January, here coming up in about four to six weeks. Those rules will then go to an into effect sometime the summer of 2021. And it's looking like August 1. Now, interestingly, Florida has their state laws that are going into effect on July 1. So there's going to need to be some interesting, you know, kind of play, if you will, between how that affects the NCAA rules.

Obviously, the NCAA has been lobbying Congress to provide protection from lawsuits, have a safe harbor, etc. And so we'll see how that even plays out. Also, obviously, in January, the new Congress is sworn in. And so we'll see kind of over the coming months what name, image and likeness legislation might come out of Congress in 2021. And it's interesting, and this will be a topic that we'll get into on another conversation. But California is having some dialogue in their state legislature. As you know, they were kind of the catalyst, if you will, when they passed their bill 206 as it related to name image and likeness. They kind of started this movement almost, you know, of state legislatures following suit and passing laws or at least considering laws that would ultimately force the NCAA to make their change to their rules. And California is having conversation now about potentially moving up their effective date of their state law in supposed to be right now 2023, but they're looking at potentially moving it up to 2022, or even potentially earlier, as it relates to rules going into effect by the NCAA. And they're also looking at ensuring that they expand as much opportunity as possible to student athletes within the state of California, which ultimately could create a very interesting tension between the NCAA approved rules and as well as the state legislatures decision as to how they might modify their law on name image and likeness.

So much deeper conversation coming with that in another conversation. But I wanted to just kind of level set where everything stands currently. So we know I mean, the bottom line with all of this is that we know that name, image and likeness changes are coming to college sports. And so to that end, one of the things that I've really have been trying to shout from the mountaintop is the importance of education as it relates to name image and likeness and the importance of ensuring that we are preparing student athletes, so that they don't get taken advantage of. Now, when I think about this name, image and likeness environment, and we have a lot of conversations with various universities, compliance departments, you know, name, image and likeness task forces. And I love having these conversations to share what's important to me as it relates to this education. And we've kind of coined the phrase "protective education," because it really is not just about this academic education that that we have this desire, first for student athletes to consume, but rather, the education is needed in order to keep them protected, to keep them from being taken advantage of to cause them to at least press the pause button when it comes to these changes in name, image and likeness.

And so these four phases that oftentimes I'll look at is there's phase one, which is really the education from a compliance perspective. What are the rules? What are the regulations? And making sure that everyone involved with an athletic department, from coaches, athletic administrators, to student athletes, that everyone understands what is allowed and not allowed, given the new rules when they go into effect. So that's phase one.

Phase Two, is the branding side of things, the monetization or the commercialization of a student athlete's brand. Basically, it's the athlete being able to make money. And that's the area that absolutely has been getting the most focus as a relates to discussion around name, image and likeness.

The next phase, obviously, where I try to beat the drum is on protective education, and ensuring that athletes are getting the education they need. Education, around decision making around due diligence around money and business, financial management, as well as contracts and understanding contracts.

And then finally, it's this ongoing management. And as a student athlete evaluates decisions that they make in the name, image and likeness environment, how do they continue to manage that and evolve their decision making going forward. But then also, as the NCAA has looked at

potentially engaging a third party administrator to oversee what name image and likeness looks like? That's kind of that fourth phase. So that's how I look at it.

And protective education is this area where I spend a lot of time and the conversation today that I just want to share with you are some thoughts around entrepreneurship, in this world of name, image and likeness.

Entrepreneurship is not really getting discussed, what's getting most talked about is the idea of whatever platform it might be. And you know, the big names that are out there open doors, influencer, open sponsorship, there are other individuals that are out there talking about branding and, and developing brand. And it's all around how can athletes make money in this space now with name through name, image and likeness? And those conversations are really around how do we get more followers on social media? How do we become more of an influencer in social media? How do we establish, develop and grow our brand in this space in our online presence? And that's, that's all important. That's, that's great. And if that's what it takes for student athletes to be able to have opportunities to earn money, through social media influencing and everything, that's great. And I think we're gonna see a lot of it and I think we'll see that come more from, you know, from more than just elite athletes, but from many student athletes. Not all, but there'll be many who will have the opportunity to, to find some form of compensation or in kind type of compensation, receiving, you know, whatever free food or t-shirts or apparel for promoting particular brands online. So we'll see that.

But one of the areas that really hasn't been getting a lot of conversation is the entrepreneurial side of name, image and likeness. And to that end, you know, in our episode last week, talked about athletes and being that CEO and setting up business entities and I think this is a great kind of offshoot of that conversation, which is: there will be athletes who are in college student athletes who are going to have the opportunity to make money from either their name, image and likeness in the marketing of their brand, or potentially even from starting their own operating entities, their own operating businesses. And entrepreneurship plays a role here kind of on both sides.

So on the one hand, you have an operating business and that operating business could sell a service a product and athletes, you know, have interests on from, you know, the idea of, you know, a clothing line or some other operating business to potentially coaching or having clinics or tutoring, things that are, you know, providing a product or a service. And to that end, athletes should have a business entity set up for that, right. So that business entity is going to provide a couple different opportunities for the student athlete.

Number one, it will provide some liability protection. So if they are, let's say, tutoring or coaching a student, and, you know, somehow, let's say, if it's coaching, that student gets injured, or the participant gets injured. Well, from that perspective, that athlete is going to want to make sure that they have some liability protection, you know, from potential lawsuits. Or let's say, if they are, you know, if they've set up an operating company where they are selling clothing, or designing clothing, or what have you, that could create a situation where again, there's liability exposure, and so you are able to set up that entity to provide that protection.

There's also kind of a financial aspect as well, from taxes and just general finances, which is you have an operating business, and you are you are providing a product or service to others, and you want to set up a business bank account, then you should have a business entity that's set up, you should have a tax ID number that is generated by the IRS. And then ultimately, you

may need or, you know, most likely, with most financial institutions these days, you need some form of operating agreement, or if you're the sole owner, a written declaration.

Now all of this is something that most people are thinking about when it comes to name image and likeness, right. Which is that student athletes are going to have all of the opportunities that non athlete students are going to be able to have on college campuses these days. So if a student athlete is taking a class, and in that class, they it's a business course, and they're, you know, required to come up with a business idea. And through that class, they develop, you know, all of the marketing strategies and all of the different ways of, of truly, kind of commercializing that that business opportunity. And then they decide after that class is over, they actually want to try to launch the business. Well, again, now in a name, image and likeness environment, they're going to have that ability, as a student athlete to be able to do that, they'll have the ability to lend their own name, image and likeness to their business, to promote their business, which hasn't happened before. And so understanding kind of what it takes to be an entrepreneur in this regard is important.

And being able to think about what it means if I want to even take on a partner. Right? So what happens if I had a partner in class? And together, we want to launch this business? So now we need to talk more about an operating agreement? And what does that look like to have an operating agreement between the both of us? How are we handling profits and losses? What percentage do each of us own? How do we make the corporate decision if we don't agree, you know, all of these things come into play.

The other side of this entrepreneurship discussion, in name, image and likeness is the idea of a loan out company. Alright, and that is where you have an entity, typically an LLC that owns the name, image and likeness of its owner, right. So if you're that student athlete, and you're going to be doing marketing opportunities, and you're going to be engaging with different brands, and signing contracts to do different types of deals, and opportunities, then you may want an LLC to serve as your loan out company. And that loan out company would do some of the same things, it would be able to provide some liability protection, it would be able to provide opportunity from a tax perspective, potentially, if there are certain expenses that are incurred in the operations of the business in the promotion of that particular brand. Again, something that you'd want to have that conversation with an accountant about as well.

So when you think about these concepts, whether it's an operating business, whether it's simply a loan out company that is there for the intellectual property of an individual student athlete, there are some conversations that need to be had, there's some learning that needs to occur in terms of understanding how these businesses work, how they are structured, how they're set up, and how to make sure that you're protected when doing that. Because I'll let all of the listeners in I'll let all of you in on kind of one of my bigger concerns when it comes to name, image and likeness and athletes potentially being taken advantage of and that is the idea of being taken advantage of with a business entity.

And that is maybe if you're a student athlete that decides that you're going to start a business, and it's an operating business and maybe it's selling some particular type of product. And now someone comes in and says hey, I really like your idea. I want to partner with you. So I want to either buy into your business, or I want to provide access to certain people or products for, you know, help with manufacturing or what have you. And now I want to be a partner in this business.

There's a lot that goes into that a lot that goes into understanding, how do you bring on a partner in your business? How do you do that legitimately? How do you ensure as a business owner that you're protected? Right? What rights are you giving to that individual, and making sure that that person doesn't come in and just try to take that business from you? Right, so these are some of the concerns that I have of understanding that because in this name, image and likeness, environment, people aren't, aren't really focused on those particular issues from an entrepreneurial perspective, they're focused on what's grabbing the headlines right now, right around branding and marketing. And those are important, don't get me wrong. But the idea of someone coming in and wanting to invest or get involved in the business operations of a student athlete, whether it's an elite student athlete who has a loan out company, or whether it's, you know, an student athlete who, you know, has just a great business idea for a product or service. Being able to understand this entrepreneurial side of name, image and likeness is going to be critical.

And so as I'm having conversations, and as, as you may be having conversations within an athletic department, it's critically important that this aspect of name, image and likeness does not go forgotten, and that there's true education, from people who understand that space, and having conversation with student athletes so that at least they press the pause button, at least they stopped to say, I know someone's talked to me about this about the idea of bringing in a partner or bringing someone else into my business. Even though this person is offering me money to get into my business. Before I take that, before I bring in that partner, I at least need to make sure that I'm having a conversation with someone who understands that space, and I have a better understanding of how best to position myself in my business so that I can continue to do those things that I enjoy about the business without being taken advantage of in without having someone take this business from me.

So again, just as a short conversation on this and the importance of entrepreneurship, entrepreneurship in name, image and likeness, but very important conversation nonetheless. As you can imagine, there will continue to be more conversations on name, image and likeness. Truly, I believe this is the biggest change to college sports in the last 70 years. And I think that we'll be having a lot of conversation as we think about how we protect the possibilities of these college student athletes.

So again, we're out here trying to protect the possibilities of folks who are listening. So hopefully you found value in this if you have, please do share it with those people in your network. Please hit the subscribe button. Give us some stars, if they're if you're on Apple podcasts, wherever you listen to podcasts, your ratings, your comments, your feedback, it matters to us and as we think about what type of programming we have as we continue to move forward with this with this podcast, we listen to you, so please do continue to reach out and share your thoughts.

I'll be taking the next two weeks off for the holidays, but we'll be back with new episodes on January 6. So in the meantime, have a great holiday season and a very Happy New Year.

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