



PROTECTING YOUR POSSIBILITIES PODCAST WITH LUKE FEDLAM

Episode 36: State NIL Legislation and the Interesting Differences | April 14, 2021

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. And today's episode, we're going to revisit name, image and likeness. And I know that we've had past episodes where we've talked about various aspects of name, image and likeness, or NIL, as you may hear it referred to. And this one is going to be a little bit different as I really want to focus on state laws.

So let's just set the stage for where name, image and likeness is right now. We'll rewind just a little bit and just talk about maybe 2021. And where we're at, in January, the United States Department of Justice, sent a letter to the NCAA basically stating that there was a thought that the way in which the NCAA is operating is violating antitrust laws. And so therefore, the NCAA Division One council determined to pause and not take a vote on the recommended name, image and likeness rules. Now, with that, they knew that there was a Supreme Court case coming up NCAA vs. Austin, which oral arguments have now been heard a couple of weeks ago. And a decision is expected sometime in June of this year, most likely later June. And while the NCAA versus Austin case doesn't directly deal with name, image and likeness, it does deal with broader issues of whether the NCAA and its member institutions can limit the educational benefits that are afforded to student athletes and whether that violates antitrust laws. And it really does get into or could rather get into the broader conversation of amateurism, who's able to determine the rights and opportunities of student athletes have, etc. And so the NCAA versus Austin case very well could change the landscape of college sports. So we're going to hear from the Supreme Court on that most likely this summer in June.

But what we do know is that individual states have been approving name image and likeness legislation. And we also know that at the Congressional level, Congress is evaluating different federal legislation, and there have been a couple that have been presented to this new Congress. But there's a common belief that nothing is going to pass from a national legislation perspective, from a federal legislation perspective, until later in the summer, potentially even this fall. So where does that leave us? It leaves us at least student athletes, it leaves college athletic departments, it leaves parents, it leaves all of the stakeholders who are around this college sports space, believing that state law is going to start this all off. What does that mean? What it means is that if you're going to a school in certain various states, then you're going to have the opportunity to earn compensation or to commercialize your name, image and likeness as a student athlete. But these states are all a little bit different. And I'm going to get into that in a little bit of a discussion around some of the different states in their legislation. But what that means is, there's also the possibility that the NCAA or potentially other states or even other

conferences, could sue to try to stop the bills, or rather the laws that are going into effect July 1, to stop them from happening.

So for example, Florida, their name image and likeness law goes into effect July 1, 2021. So we're less than 100 days away. You could imagine that the NCAA could potentially sue to stop that bill from going into effect of that law from going into effect. You could imagine that, potentially another state could do that maybe a neighboring state like Georgia or something other state in the south that felt like Florida would have undue recruiting benefit and recruiting opportunity. If you even just look at the power five, you could imagine a conference like say the PAC 12 trying to stop Florida's law from going into effect, because you then have you have schools in the ACC schools in the sec in Florida. And let's say another conference doesn't want particular conference to have a recruiting bench.

So as you can imagine, we could very well see lawsuits come into play. But at the same time states are racing to approve legislation so that they're not at a recruiting disadvantage. And I've had questions from people who've asked about just how divisive our politics are these days, between Republicans and Democrats. And I think this is one of those instances where sports does prevail, because pick a state and pick one of the more popular schools within that state. And you can imagine that both Republicans and Democrats alike want to see the school have a recruiting advantage, or at least not be at a recruiting disadvantage relative to rival schools, or just other schools in other states. So again, this shows sports at least having an ability to transcend some of the politics that we see as it relates to other forms of legislation.

So let's take a minute and just kind of look through this national landscape of states and their legislation and some of the differences because while we may broadly be able to say, "Oh, well, states are coming on board, states are passing name image and likeness legislation." And so therefore, won't be a recruiting advantage. There could still exist recruiting advantage if student athletes, their families fully research and understand the differences and the nuances of the various states name image and likeness laws or name image and likeness, proposed legislation. I do think just kind of take a step back. I do think, though, that as states start to pass additional legislation into law, I think that from a timing perspective, at a certain point, the federal government is going to have to act. And it very well may be at a time late this summer, sometime this fall, which would then supersede state laws in these areas. But for now, what we have to go on is what the state legislators are passing and having the ability to understand what these nuances are that exists between the state legislation.

So I think it's important that we start off in Florida. California was really first. But at the same time, California made their effective date in 2023. And that really was to be able to give the NCAA time to be able to put in that NCAA federal rules around name, image and likeness, which obviously, we've seen what's happened over the last six to 12 months on this. So Florida, passed their legislation into law and set it to go into effect on July 1, which completely sped the process up and made this much more real. Now, I do think it's important to note the fact that there hasn't been a lot of conversation around the differences in various states legislation or various states laws as a relates to name image and likeness. And part of that is just because there has been so much else to report so many other things going on as it relates to college sports, the impact of COVID, the would seasons happen, schools who are reducing the number of programs that they have issues of social justice and beyond. So, again, a lot of news going on. But it's important to take a moment to recognize some of these differences among states laws.

So let's talk about Florida, there are some basic commonalities among all states, that student athletes are able to be compensated off of their name, image and likeness is kind of one of the core tenants of state legislation around name image and likeness. And so when it goes into effect, the purpose of legislation is for student athletes to be able to earn compensation off of their name, image and likeness. But there are some unique aspects to this as well. And one of the unique aspects of Florida is that Florida's law says that athletes can't sign deals with any company that would compete with their athletic departments. Right. So that's an interesting one, because what that says is if a particular school that I'm considering in Florida happens to be a Nike school, then I can't sign an Adidas contract. Or if this school is a school, that is with Jane Doe Chevrolet, that could potentially mean that I couldn't sign a deal to do an appearance at John Doe Ford company, right. So it's interesting aspect to that. And I think, as the legislation or the law in Florida also requires a student athletes have to submit all of their endorsement opportunities to the athletic department, I think it's going to be interesting to see if the schools then have to pass on a list of their sponsorship agreements and their deals that they have in place with local and national companies to the student athletes. So the student athletes would even know whether or not an opportunity could potentially be in conflict. So again, that's one of the unique aspects of Florida's legislation.

So then we move on to Mississippi and Mississippi is interesting, because Mississippi came to this really quickly, and their state legislatures have talked about how they're not necessarily that happy with the legislation, but that ultimately, they just don't want to lose a competitive edge when it comes to recruiting, athletically and academically as well, when they're competing against other schools. So, from that perspective, I think that is a common theme among legislature, across the country. So in Mississippi, it is interesting, because one of the provisions that they've added to their law is that schools are able to impose reasonable limitations on the dates and times that a student athlete may participate in any endorsement activities. So again, Mississippi, it's going into effect July 1. And it's basically allowing schools to impose limitations on when a student athlete engages in name, image and likeness. Now, this is interesting, because we know that a lot of name is a likeness, engagement is going to come around social media and social media influencing. And so it'll be interesting, right? When someone can send a tweet or post an Instagram story, or what have you. And really, at any time of the day, walking between classes at home before they go to bed, whatever that might be. And so it'll be interesting to see in the state of Mississippi, what type of "reasonable limitations" schools will put into place when it comes to limiting a student athlete on the times in which they engage in name, image and likeness. So that'll be interesting to see in Mississippi.

So now let's look at some of the other states, that are posting and voting on various legislation and bills that are working their way through state legislatures across the country. And let's look at Alabama. So obviously the University of Alabama, I'm sure has played a role in and has been consulted by the state legislature and has had conversations around this legislation. And what's interesting is that in Alabama, it would prevent schools from limiting compensation as student athletes can earn. But also, it's going to require certain things like requiring financial literacy and life skills workshops to prepare student athletes, which many states have spoken about. It's going to require coordination between student athletes and schools regarding the contracts that are being engaged in which again, is another interesting aspect of all of this, right? But one of the most interesting factors in Alabama's legislation is that it would require schools to fund annuities for student athletes who opt out of seeking compensation in the marketplace while playing college sports. Now, that's fascinating, right? So if you say, "Hey, Alabama, I'm not going to seek compensation, I'm not going to engage in name image and likeness," then the school has to fund an annuity that is really interesting. And so we're gonna have to see what that even looks like. Again, this is legislation that's working its way through the Statehouse.

Obviously, it's subject to change. But that's one of the main elements that I think will be interesting to follow to see if that stays in the final law or the final legislation that gets passed and approved by the Alabama Statehouse.

Another interesting one that is working its way through the state legislature is for Oregon. Now Oregon, has really gone in an interesting direction because they are actually calling within this proposed legislation, it's Senate bill five for anyone who wants to look it up, for royalty payments to each student athlete who is a current member of a team related to that athletic departments, merchandising and apparel agreement. So what we're talking about is an actual revenue share/royalty payment, that would go to the student athlete based on what the athletic department is making off of the student athletes or a particular team. In merchandising and apparel agreements, that one is really an outlier. I have yet to see other states who have said that, that a royalty payment or some type of revenue share would become part of the state legislation. So really, truly an interesting look at how different states are contemplating name, image and likeness and how they're proposing potential legislation to address the challenge that they see with this competitive landscape for college athlete recruiting.

So we're gonna see how this all ends up playing out, obviously, in a couple of the states that I spoke about, it's still proposed legislation. So we have to see what the final outcome is of the bills that are signed into law. But we've already heard a bit about Mississippi and Florida and what's made it through in their laws and how they're different and how it's going to be unique. So what that leaves us with is the fact that there will still be a recruiting advantage, or rather, recruiting differences. And so, schools, coaching staff, athletic departments are really going to have to understand their state's laws, if they want to be able to use that for part of recruiting, and just to understand how student athletes are going to be able to engage in a name, image and likeness space.

Now, as I said at the beginning, all of this can ultimately be preempted by federal law. But we'll have to see what Congress does. And we'll see kind of what impact that might have. But I think everyone would agree that this is a very complex and dynamic situation that we find ourselves in. And it will be interesting to see how it all plays out. But one thing you can be sure of, I will continue to talk about it in the hopes of trying to educate individuals to be able to be protected as they think about how they might engage in this name, image and likeness space. So with that, thank you so much for tuning in to the protecting your possibilities podcast. Continue to share, like leave ratings, and provide your comments because it's your comments, your questions that I get that helps to determine the various episode topics that we discuss. So again, thank you for tuning in. Have a great day.

Disclaimer: Porter Wright Morris & Arthur LLP offers this content for informational purposes only, as a service for our clients and friends. The content of this publication is not intended as legal advice for any purpose, and you should not consider it as such. It does not necessarily reflect the views of the firm as to any particular matter, or those of its clients, please consult an attorney for specific advice regarding your particular situation.