



PROTECTING YOUR POSSIBILITIES PODCAST WITH LUKE FEDLAM

Episode 45: The NIL Countdown Continues | June 16, 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 into the Protecting Your Possibilities podcast. I'm your host, Luke Fedlam and here we go with another episode. And I have to say that I've gotten so many questions, and so many people who want to talk or want thoughts on name, image and likeness. And we've done many conversations on name, image and likeness over this past year, as obviously, it's one of the most significant changes coming to college sports in decades. Some might say one of the most significant changes that are coming to college sports since student athletes started receiving athletic scholarships. And the reason so many conversations and questions and comments are coming right now is because we are, just, I mean, literally days away from potentially all student athletes having name, image and likeness rights. But at least a student athletes in certain states receiving the right to earn compensation off of their name, image and likeness.

And so because we are so close, and this podcast is launching on June 16, you know, we're at this point, we are just a few weeks away from July 1. And so I wanted to kind of readdress some of the issues of name, image and likeness and talk about where things stand right now. Because it's important and understanding kind of the overview of student athletes, their protection, and the preparation of this industry that's becoming, you know, really built around name, image and likeness.

So where are we at right now? Right now, we're at a place where we have multiple states who have passed their own name, image and likeness legislation. They've passed it into bill, into law, and it will go in effect in those states in July. There are other states who have also passed name, image and likeness legislation that are just set to go into effect at a later date. Some in early 2020, to some as late as 2023. So that's where we're at from a state law perspective.

From an NCAA perspective, as we know, just as a refresher, in case you aren't as up to speed on where all of this is at, in early 2021, the NCAA was prepared to set forth a series of rule changes that would mark the opportunity for student athletes to receive compensation from their name, image and likeness. And that was put on hold based on the Department of Justice having some concerns of there being antitrust violations and potential for antitrust violations by granting that authority. And so what you have then is the NCAA at this point being in a place where it really is important for the competitive balance of the NCAA, and its sports and its member institutions to authorize and allow for all student athletes to be able to earn money off of their name, image and likeness. So the NCAA is scheduled to get together and have this conversation, the council is going to meet June 22, and 23rd. So we should hear some more

information from the NCAA as to what they might do here in authorizing all student athletes to earn money off of their name, image and likeness. Because if they don't, either, if they don't act, or if they don't allow for name, image and likeness changes to be achieved by all student athletes across the country, then you have a situation where the schools in certain states will have a significant benefit when it comes to recruiting when it comes to retention.

And let me just break that down for a second. Because a lot of times people talk about this recruiting advantage for schools that are in states that have passed name, image and likeness. And that is most definitely accurate. Obviously, if you're a high school student that's evaluating where you're going to go to school - if you're looking at a school in a particular state that allows name, image and likeness compensation for student athletes, versus a state that does not allow that or have legislation in place, then it's pretty obvious that there would be a recruiting advantage by the school in the state that allows for name, image and likeness compensation.

But a lot of people don't think about the retention aspect of this as well. And the retention aspect goes in line with a recent change that occurred at the NCAA division one level in particular around the one-time transfer portal rule change, which in essence, allows the student athlete to enter the transfer portal and transfer schools one-time without having to sit out a season and wait for any reason, right. And so, what you have then is a situation where if you happen to be a state that has not taken on name, image and likeness and does not have legislation in place, you know, you may have student athletes then that get recruited by other schools to transfer and to transfer to a school that is within a state that allows for name, image and likeness opportunities for student athletes. So again, it's a recruiting issue, and it's a retention issue, all wrapped up into one beyond just what the NCAA might do.

We do know that the NCAA was in front of the Supreme Court of the United States earlier this year at the end of March. And we are still awaiting a decision by the court. And the issue that was before the court was not as specific as you know, name, image and likeness and should name, image and likeness be allowed or authorized. But rather, the question in front of the court was very narrow around the ability for the NCAA to limit educational benefits that go to student athletes and whether or not that's an antitrust violation. That's the narrow question. But as we know, the court can take that as far as they want to, and the court may address issues of amateurism issues around student athlete compensation, I think, more appropriate is that we may see the court addressing issues of who is best suited to be able to address these issues around student athletes and compensation or benefits. Is it the courts in the court system? Is it the NCAA? Is it Congress? Right? Because when you think about it, I did a podcast a past episode on this, but the NCAA hadn't been in front of the Supreme Court of the United States since 1984, which was the Oklahoma Board of Regents case on antitrust issues. And so the question really does kind of remain who is best suited right to address these issues of student athlete benefits and student athlete rights, I think we're going to see that Congress is most likely going to be the one who really acts here, right.

And that's this other stakeholder group that we that we have to address. There has been significant conversation. At the federal level, there have been proposed bills in discussion around name, image and likeness, and putting together a bill that could potentially, you know, pass both houses of Congress and be signed by the president to become to come into law. And there have been conversations about this and proposed bills, you know, even last year in this arena. And what we're seeing now is there are a couple bills that have been presented in this current session of Congress. There are a couple others that we will most likely see come forward in the coming days and weeks. And just last week, Senator Cantwell from the state of Washington, she is the senator who is the chair of the Senate Commerce Committee. Her

committee held a hearing around name, image and likeness. And the possibility of having a single national standard for college athletes, as it relates to name, image and likeness. Because if Congress doesn't act, then you will end up having states who will have their own legislation, their own bills in place. And mind you there are many states who have either passed legislation who have said that they will move up their date, their effective date, if there are other states that are able to go into effect, and their student athletes are at a disadvantage. And there's another group of states that are looking at this from the perspective of how can we push through legislation that can go into effect quickly so that our student athletes are not at a disadvantage either.

And beyond just student athletes, really, that the institutions within those states aren't at a disadvantage when it comes to recruiting when it comes to retaining student athletes. And so if Congress does not act, then you have states that have different nuances within their state legislation. And it's imperative that there is a single national standard if the goal is to have a competitive balance within the NCAA and within college sports. So when Senator Cantwell held her hearings last week, we heard from many different stakeholders in this space. One was Senator Cory Booker, who is from the state of New Jersey who has put forward a student athlete Bill of Rights along with I believe Senator Blumenthal from Connecticut, where it really is a broad series of rights that will be authorized and opened up to student athletes. And he was very critical of what the NCAA has not done over the past number of years knowing that this is an issue that has been in front of them for a while, and knowing just how much has changed in the business of college sports over the last few decades. So again, he was able to speak and share some of his thoughts there.

But then we had Coach Few who's the head men's basketball coach at Gonzaga. We had the NCAA president Mark Emmert spoke along with others, as well, some professors, some school administrators, and beyond. And the point here is, is that, at this point, everyone who was called by and part of this hearing, and those who asked the questions, all agreed that something needs to happen here, right, something needs to happen in terms of a single federal plan around name, image and likeness, so that student athletes don't have to get into the, you know, process of researching individual state laws to try to figure out which state might have the most advantageous laws as it relates to name, image and likeness. And then also, so that schools aren't at a disadvantage when it comes to recruiting and retaining their student athletes. But how Congress goes about a single name, image and likeness system is absolutely up for debate among industry experts across all stakeholder groups of NCAA have business and beyond. And so that's where I think it's interesting to dive into what those differences are. And some of those differences will lead to challenges in terms of trying to get a bill passed by both houses of Congress and ultimately signed by the president, there is a significant need for it to happen. But just because there's a need doesn't mean that it will happen.

There is obviously from the NCAA perspective from Mark Emmert perspective as president of the NCAA, a significant conversation around the protections that the NCAA should receive and its member institutions should receive, should there be a single federal standard for name, image and likeness. The NCAA doesn't want to face significant lawsuits, institutions don't want to face lawsuits by former student athletes, who would see that this change was made and then say, well, this change should have been in place while I was there, and therefore I'm owed some form of compensation.

And again, let me be very clear, because sometimes this gets mixed up in these conversations around name, image and likeness, when we're talking about name, image and likeness, as I'm talking about it through this entire podcast episode. And just generally, as people are discussing

it now, who are involved in this space, we're not talking about pay for play, right? We're not talking about student athletes getting paid by their institution to play sports, they're what we're talking about is a student athlete having the right to contract with a third party outside of their institution, and receive compensation for their appearance for the use of their name, image and likeness for their coaching for whatever business purpose that that student athletes engages with that third party. So that's, that's what we're actually talking about here.

But the NCAA to my earlier point is looking for safe harbor protection so that they don't get sued or that member institutions don't get sued by past student athletes or others. There are some people on the other end of the spectrum that want full student athlete rights to be able to get involved in revenue sharing, to be able to create almost an a union like entity or organization so that there can be collective bargaining. Obviously, the flip side of that coin is that the NCAA and institutions don't want there to be an employer/employee relationship between the school or the institution and a student athletes.

So it wouldn't be a traditional, you know, union, but to have an organized, possibly 501c4 or some other, you know, nonprofit kind of organization to bring the collective student athletes together to be able to have some collective bargaining on certain rights might make sense. If you could imagine a some form of video game or some other issue that arises, then, you know, student athletes might want to be able to come together to bargain as to, you know, what their rights might be.

So again, there is a lot of questions and debate and a lot of differences in terms of what this federal single standard of name, image and likeness might look like. But the bottom line is Congress is going to have to act. Otherwise, we are going to have a patchwork quilt of name, image and likeness legislation that's held at the state level, and that there's no single definitive organization responsible for the ongoing management and oversight of what this model might look like. Some of the proposals that have been put forward in terms of potential legislation from the federal level, could put that oversight in the hands of the Federal Trade Commission in the hands of an independent organization put together specifically to do that work. As you may remember, and recall, the NCAA has talked about a third party administrator or TPA, but that's obviously been put on hold as all of this gets worked out. So a lot is going on right now, a lot more to come.

But July 1 is about to be here. And it will be interesting to see where we're at. Now, at the federal level, most people don't believe that a federal law is going to be able to go through the process and go into effect on July 1. But I think if there is a, a signal from the NCAA or from Congress, rather, if there's a signal from Congress, that they have come to an agreement, at least in concept around what a single name image and likeness model might look like, then I think we will most likely see something late this summer or early this fall around federal legislation.

So listen, stay tuned, keep up with me, there is much, much more to come on this a lot of conversations that we'll need to have. But I look forward and thankful for everyone who's already reached out and look forward for those questions and comments that continue to come because this is a complex space that will have significant implications on all stakeholders involved from the student athletes, to their parents, to schools and institutions to teams and to the NCAA itself, as well as conferences so stay tuned, more to come. Again. Thank you so much for tuning in. Really appreciate your comments, your feedback. If you have any questions, don't hesitate to reach out to me. Feel free to share this episode with others in your network and in your circle. And I look forward to talking to you again real soon. Until then, have a great day.

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