THE RECORDER

How NIL Will Impact Insurance, Taxes and Other Legal Issues for Collegiate Athletes

Several bills have been introduced from both sides of the aisle in the U.S. Senate that provides a framework to monetize NIL. There is clearly an appetite for a national framework, but it is anyone's guess as to when it would or how it can be created.

By **Frank N. Darras** | December 21, 2021

Frank N. Darras founding partner of DarrasLaw.

"If college athletes are going to make money off their likenesses while in school, their scholarships should be treated like income. I'll be introducing legislation that subjects scholarships given to athletes who choose to 'cash in' to income taxes."—North Carolina Sen. Richard Burr, 2019

College athletics experienced some long-overdue changes during the Fall 2021 semester, as our student-athletes are now eligible to make money from the use of their name, image and likeness (NIL). Nearly 30 states have taken interim action, either through executive order or enactment of legislation, to allow student-athletes to finally earn income for their NIL.

Furthermore, the National Labor Relations Board stated its intention in late September to classify certain players at public academic institutions as employees under the National Labor Relations Act, which would afford them all statutory protections.

While this can certainly be considered progress, there is still a need for new federal legislation to provide greater direction and focus on the matter. It is obvious that this is on senators' minds, as several bills have been introduced from both sides of the aisle in the U.S. Senate that provides a framework to monetize NIL. There is clearly an appetite for a national framework, but it is anyone's guess as to when it would or how it can be created.

All of these changes—enacted and proposed—mark the start of a lasting potential impact on the legal and tax considerations for college athletes. Perhaps most importantly, students and their families should be cautious and careful when capitalizing on their NIL and signing on any dotted lines.

For nearly 100 years, the National Collegiate Athletic Association (NCAA) dictated that student athletes could not accept payments for playing on behalf of their schools and could not be compensated for their NIL. Recent developments changed that in the form of the new interim policy.

To borrow a basketball term, the NCAA "pivoted" away from this cornerstone rule in response to a landmark decision handed down this summer by the U.S. Supreme Court. On June 21, the court unanimously sided with former college players in a longstanding dispute with the NCAA about compensation in *American Athletic Conference et al. v. Alston et al.* The court found that the NCAA cannot limit educational benefits to student-athletes and also rejected the NCAA's argument that it was protected from the nation's antitrust laws.

On June 30, the NCAA Board of Governors adopted a uniform interim policy suspending its NIL rules for all incoming and current student-athletes in all sports and allowed the players to potentially earn compensation from use of their NIL and to engage with companies that manage NIL activities.

However the NCAA dictated athletes are required to report any NIL activities to their respective schools, which are in turn required to ensure compliance with any applicable state laws. College athletes in states without NIL laws are generally free to engage in NIL activities without violating NCAA rules as long as they don't step outside their own college or university stated NIL policy. However, the NCAA has kept in place prohibitions on pay-for-play arrangements and restrictions on NIL compensation related to recruiting.

On Sept. 29, NLRB General Counsel Jennifer Abruzzo issued a memorandum providing updated guidance regarding her position that certain "Players at Academic Institutions" (which she noted are "sometimes referred to as student athletes"), are employees under the National Labor Relations Act, and, are thereby afforded all statutory protections.

The memo further advised that, where appropriate, she will allege that misclassifying such employees as mere "student-athletes" and leading them to believe that they are not entitled to the Act's protection has a chilling effect on §7 activity and is an independent violation of §8(a)(1) of the Act.

One day later, NCAA president Mark Emmert testified before a House subcommittee, urging Congress to pass a federal law on NIL to eliminate the checkerboard application of some states with NIL laws, and some without. He already had some support among legislators.

In 2019, proposed federal and state legislation related to modernizing student-athlete NIL rules began making headlines. In response, North Carolina Sen. Richard Burr stated via tweet in October 2019:

> "If college athletes are going to make money off their likenesses while in school, their scholarships should be treated like income. I'll be introducing legislation that subjects scholarships given to athletes who choose to 'cash in' to income taxes."

The statement drew the ire of some, including former college athletes. The Republican senator, however, who played Division 1 football, did follow through on his intentions and on the same day as the NLRB statement, introduced the NIL Scholarship Tax Act. According to his announcement, the legislation is designed "to protect the integrity of amateur athletics at colleges and universities across the nation," and "allow student-athletes to choose between receiving a tax-free scholarship for a post-secondary degree or the opportunity to earn outside compensation" for their NIL.

The NIL Scholarship Tax Act would allegedly help protect the amateur collegiate sports model by allowing student-athletes to choose between a tax-free scholarship for a college degree or receive the opportunity to earn outside compensation. Student-athletes earning less than $20,000 from outside compensation would continue to receive their scholarship under the same tax treatment; however, students who earn more than $20,000 per year would be required to include their scholarship in Adjusted Gross Income for federal income tax.

Burr's is one of several high-profile proposals introduced in the past year that offer a national framework. Others from Republicans and Democrats include:

- Fairness In Collegiate Athletics Act (FCA)
- College Athlete and Compensation Rights Act (CACRA)
- College Athlete Bill of Rights (CABOR)
- College Athlete Economic Freedom Act (CAEFA)
- Amateur Athletes Protection and Compensation Act (AAPCA)
- Student Athlete Level Playing Field Act (LPFA)

From revenue sharing and students' ability to unionize, to the liability limitations and restrictions on certain types of endorsements, each act covers a lot of ground while differing from the next.

There are other considerations that are getting lost in the cacophony. For example, a collegiate athlete should not pay twice for an on-field injury—for instance—by losing both a promising professional athletic career and the academic "compensation" for which the athlete sacrificed his or her body. Nor should an athlete ever lose a scholarship because of a coaching change that leaves the athlete on the outside looking in, because of a new playing scheme or recruiting focus has come to town.

College sports has always had a passionate audience because it hasn't operated like professional leagues. Plus, this new proposed change would come with all the practical and legal difficulties that has often marred professional sports, in which labor and management have an at-best tenuous and defensive relationship.

Colleges and their sports staff have earned millions of dollars through the years, and our athletes may finally be on their way to receiving their fair share. Whether they are students, employees or competitors, college athletes should be focused on protecting themselves on and off the field.

There is an undeniable allure to accept endorsements or binding agreements for what will seem like a lifetime's worth of funds to a teenager or 20-year-old player. Some deals may be too good to be true and our college athletes need to be very careful. The new interim policies governing NIL are just beginning at the state level and there is a hope that federal legislation will follow to protect our student athletes on and off the field.

Recognized as America's top disability attorney, **Frank N. Darras** *has been prominently featured in the Wall Street Journal, Forbes, USA Today, Money Magazine, Medical Economics, Smart Money, Chiropractic Economics, CNBC, the Los Angeles Times, the New York Times, and the Wall Street Journal.*
