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Contract Basics for Every Student-Athlete NIL Deal

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NCAA Student-Athletes (“SAs”) and companies around the country should recognize the extraordinary potential that exists in the market now that SAs control the rights of their name, image, and likeness (“NIL”). Still, the biggest issue in capitalizing on this potential is SAs, coaches, trainers, and companies alike don’t know what they don’t know when it comes to signing NIL deals. Responsible employers will want to avoid risking the eligibility of their favorite institution’s potential game-winning performers. As part of Bodman’s ongoing series about NCAA NIL regulations, below is an introductory checklist for every SA and employer to consider when creating a NIL endorsement deal.

The Location of the Student-Athlete’s University Determines Applicable Regulations

The NCAA, a majority of states, and numerous universities have implemented regulations and laws governing SAs’ NIL rights. SAs and employers should look to the policies of the state where the SA is attending school for the applicable standards.

Deal with the Student-Athlete’s Agents, Attorneys, and Accountants

Depending on a SA’s earning potential and seriousness about capitalizing on NIL opportunities, he or she may have an agent, attorney, and/or accountant. Companies should be aware of SAs’ representation when negotiating deals, but also recognize any representation is strictly limited to procuring and negotiating market opportunities during the SA’s NCAA eligibility.

Consideration Must Exist in Every Deal

In other words, two occurrences must happen in every deal: (1) the SA must provide some deliverable to the endorser (Instagram post) and (2) the SA must receive some benefit from the endorser (money or gear). Typically, courts do not evaluate the value of what is provided or received – the consideration simply must be exchanged.

Pay-for-Play Limitations

Any endorsement deal must compensate a SA only for the use of his or her NIL rights. SAs and companies must avoid compensation that is contingent on enrollment at a particular university or specific athletic performance or achievement. However, royalty deals tied to how many sales a SA's endorsement generates seem likely to be permissible, but they could potentially trip a few of NCAA's pay-to-play wires.

Usage Rights Clauses

The ability to grant NIL rights to a company is exactly how endorsement earnings are made. Companies likely want to be able to use a SA's NIL rights in perpetuity; however, setting an exhaustion period that defines the length and limitations of a sponsoring company's use of a SA's NIL rights for products or materials is an equitable arrangement for both parties.

Exclusivity Clauses

Companies want to avoid SAs promoting or using competing brands' products. If additional value is provided, SAs can consider aligning their NIL rights exclusively with certain products and brands. However, any exclusivity rights must be clearly defined and understood by both parties. Additionally, any exclusivity clause must contain language that permits a SA to wear a competing brand when mandated at a competition or event.

Force Majeure Clauses

Unforeseeable circumstances can prevent SAs and companies from fulfilling a contract. The traditional force majeure clause excuses contract performance when some "act of God" or extraordinary event occurs. Given SAs' youth and unpredictable schedules, broader flexibility may be necessary to require performance while limiting harsh penalties for individuals who are still in college.

Morals Clauses

SAs and companies will want to avoid association with individuals who engage in illegal, immoral, or unethical conduct. To protect their reputation, SAs and companies can include a clause that permits termination of the endorsement deal if the other party is involved in such behaviors.

Clear Intellectual Property Rights

By simply being in a photo, SAs do not automatically own all the required intellectual property ("IP") rights to the photograph or what is pictured. SAs and companies must obtain the consent to use the trademarks of their institution and other brands in all marketed materials. The third party that originally created any media must also consent to its use in any endorsement. It is important to clarify which party is responsible for obtaining this IP clearance, and what happens if the other party is sued for contributory infringement.

Source of Endorsements

Certain brands and industries are restricted from entering into endorsement deals with SAs. Specifically, this includes tobacco products, alcoholic beverages, gambling associations, and companies that create conflicts with a university's exclusive partnerships (think Adidas sponsoring a SA whose university wears Nike equipment).

Impact on Financial Aid and Pell Grant Eligibility

Money made from NIL deals is considered taxable income, which needs to be reported on any need-based financial aid application. Neither academic nor athletic scholarships are "need-based," but SAs who receive need-based aid must remain aware of what the tipping point is for NIL benefits to outweigh the costs.

Disclosure is Key

Regardless of state and/or university policies in place, SAs should clear every potential endorsement deal with their university's athletic department. Being proactive will avoid a SA losing eligibility in exchange for the right to receive a t-shirt and write "XYZ Athlete" in his or her Instagram bio.

Marketing opportunities are available for companies and SAs that want to capitalize. **Bodman's NIL Working Group** can help companies and SAs create NIL endorsement deals that best fit their unique circumstances. Bodman cannot respond to your questions or receive information from you without first clearing potential conflicts with other clients. Thank you for your patience and understanding.

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