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Navigating the Changing Landscape of College Athletics

NCAA and Legal Considerations for Colleges and Universities

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Presenters



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Agenda

New NCAA Constitution

Name, Image and Likeness

NCAA Policy on Campus Sexual Violence

NCAA v. Alston

College Athletes as Employees

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New NCAA Constitution: Real Reform or More of the Same?



- Amateurism
- NCAA v. Alston
- NIL laws
- Transfer Portal
- Compensation to Athletes
- Athletes as Employees
- Title IX Gender Equity
- Revenue Distribution

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New NCAA Constitution

- Adopted January 20, 2022
- 2/3rds majority of ALL members (passed 801 to 195)
- Really about Division I – FBS – Power 5?
- Many of the same concepts from the past, same distribution of revenue to Division II (4.37%) and Division III (3.18%), each division allowed to make own rules, each division authority to structure itself as it deems necessary, “including the creation of subdivisions”

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New NCAA Constitution

Preamble

- Article 1 – Principles
- Article 2 – Organization (Association, Divisions, Conferences, Member Colleges and Universities, Student-Athletes)
- Article 3 – Finance
- Article 4 – Rules, Compliance, Accountability
- Article 5 – Amendments to the Constitution
- Article 6 – Institutional Control

What about previous Articles that addressed Membership, Voting, Legislative Authority, aka Division Dominant?

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New NCAA Constitution

New Principle	Former Equivalent (Division I)
A. The Primacy of Academic Experience	Article 2.5 The Principle of Sound Academic Standards
B. The Collegiate Student-Athlete Model	None.
C. Integrity and Sportsmanship	Article 2.4 The Principle of Sportsmanship and Ethical Conduct
D. Student-Athlete Well-Being	Article 2.2 The Principle of Student-Athlete Well-Being
E. Institutional Control	Article 2.1 The Principle of Institutional Control and Responsibility ; Article 2.8 The Principle of Rules Compliance
F. Diversity and Inclusion	Article 2.6 The Principle of Nondiscrimination and Article 2.7 The Principle of Diversity within Governance Structures
G. Gender Equity	Article 2.3 The Principle of Gender Equity
H. Recruiting Standards	Article 2.11 The Principle Governing Recruiting

Principles Eliminated (Division I)

[Article 2.01 General Principle](#)

[Article 2.9 The Principle of Amateurism](#)

[Article 2.10 The Principle of Competitive Equity](#)

[Article 2.12 The Principle Governing Eligibility](#)

[Article 2.13 The Principle Governing Financial Aid](#)

[Article 2.14 The Principle Governing Playing and Practice Seasons](#)

[Article 2.15 The Principle Governing Postseason Competition and Contests Sponsored by Noncollegiate Organizations](#)

[Article 2.16 The Principle Governing the Economy of Athletics Program Operations](#)

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New NCAA Constitution

Collegiate Student-Athlete Model = “Student-athletes may not be compensated by a member institution for participating in a sport but may receive educational and other benefits in accordance with the guidelines established by the division.”

Scholarships, + COA (\$6,000 +), + Education-related benefits (\$5,980) = Employment?

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New NCAA Constitution

Regulatory Considerations:

- Each division shall establish guidelines regarding athlete benefits, including commercialization of name, image and likeness...???
- Each division shall establish policies and procedures for enforcement of Association and division rules and regulations, and the Association will provide requested support for divisional implementation

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New NCAA Constitution

NCAA Division I Enforcement and Infractions Process:

- Division I Board of Directors suspended referral to the Independent Accountability Resolution Process (IARP)
- Division I Board of Directors allow enforcement staff to exercise discretion to process violations that could be deemed Level II as Level III, without need for adjudication by the Committee on Infractions.
- All other current bylaws and processes remain in effect.

Division II and III Enforcement and Infractions Process largely unchanged

Next steps (6 months) – Division I Transformation Committee, Division II Implementation Committee, Division III Constitutional Advisory Council

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Name, Image and Likeness (NIL)



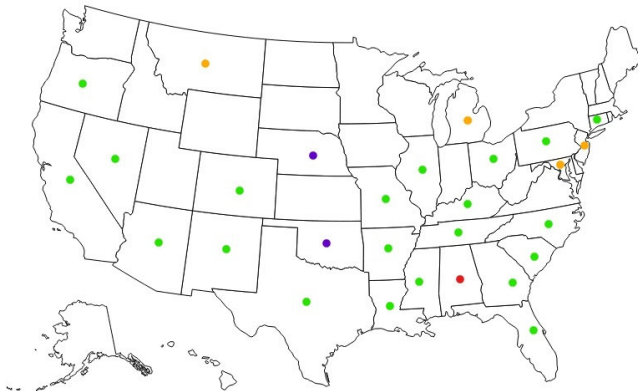
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NIL – State Laws



- Green** - NIL law in effect
- Purple** - Optional Effective date but no later than 2023
- Orange** - NIL law passed with delayed effective date
- Red** - NIL passed but pending legislation to repeal. Alabama House voted to repeal 97-1.

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NIL - NCAA Rules

Interim NCAA policy effective July 1, 2021

- College athletes can engage in NIL consistent with law of the state where the school is located.
- If attend school without state law, college athletes can engage in NIL activity without violating NCAA rules.
- College athletes can use professional service provider for NIL.
- Must report NIL consistent with state law or school or conference requirement.
- Schools and conferences may choose to adopt their own policies.
- Boosters – Per NCAA Q&A, boosters can engage in NIL activities with student-athletes so long as it is not an impermissible inducement and does not constitute pay for play.
- No “pay-for-play” or impermissible inducements.

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NIL – In Action

[New NIL Twist: Alumni, Collectives Pledging Cash to College Athletes](#)



Dec 15, 2021

[Paul Steinbach](#)



Money for college athletes is being pledged by the millions in a new development six months into the name, image and likeness era, raising concerns about the role of wealthy alumni eager to back their beloved alma maters.

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NIL - NCAA Rules

- Bylaw 13 (Recruiting Inducements)
- Bylaw 16 (Extra Benefits)
- Is this a quid pro quo arrangement?
- If not, is any benefit provided associated with otherwise permissible NIL activity?
- Does market value matter?

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NIL - Action Items

- Institutional policies and procedures
- Recruiting/booster education – Are there limits?
- International athletes
- Title IX Gender Equity Treatment
- Additional innovation, change, over next 6 months

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NCAA BOG Policy on Campus Sexual Violence

NCAA sued by 7 women for failure to protect in alleged sexual assaults

Apr 29, 2020

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Paula LavigneESPN Staff Writer

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NCAA Policy - Expectations

- Adopted first version of policy August 2017
 1. Athletics Department (Informed, integrated, compliant Title IX)
 2. Resources (Available in athletics and provided to athletes)
 3. Education (Athletes, coaches and staff)
- April 2020, NCAA BOG expanded policy
- Delayed implementation as a result of COVID-19
- New requirements must be implemented by 2022-23

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NCAA Policy - Expectations

4. Disclosure

- Incoming, continuing, transfer
- Disciplined through Title IX proceeding or criminal conviction for sexual, interpersonal or other acts of violence
- Transfer must disclose “incomplete” proceeding

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NCAA Policy- Expectations

5. Confirm and Share

- “Reasonable steps” to confirm
- All NCAA member institutions must share relevant discipline and incomplete Title IX as a result transfer (consistent with state and federal law)



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NCAA Policy - Expectations

6. Written Procedure

- Recruit athlete or accept athlete transfer must have written procedure that directs staff to gather information to put institution on notice of any history related to sexual violence
- Failure could result in penalties

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NCAA Policy – Action Items

- Title IX Office, Admissions, Athletics, Registrar, Student Affairs
- Interplay with Title IX Regulations and Institutional Policies and Procedures
- Confidentiality
- FERPA and state law
- What do you do if find information?

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NCAA v. Alston

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NCAA v. Alston SCOTUS Decision


June 21, 2021 – Upheld certain NCAA rules violated
Section 1 of the Sherman Antitrust Act

- Limited issue related to NCAA rules limiting “education-related benefits” with huge implications
- NCAA can no longer rely on NCAA v. Board of Regents of the University of Oklahoma (1984) dicta to support antitrust protection
- Judge Kavanaugh concurring opinion suggests all NCAA compensation rules (e.g., scholarship limits) “raise serious questions under antitrust laws”

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11.24.2021 | Texas Athletics

Texas student-athletes set to receive additional financial support

Beginning with the 2022 spring semester, Longhorn student-athletes can earn supplemental support through the Academic Enhancement Benefits program.

Ole Miss Breaks Ground on Post-Alston Ruling 'Extra Benefits'

The Rebels are the first to take advantage of the recent Supreme Court ruling allowing schools to hand down payments for academic achievements.



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Athletes as Employees

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Classifying college athletes as employees, NLRB memo sets stage for further NCAA destabilization

The NCAA's power continues to diminish as athletes earn more rights and opportunities

By **Dennis Dodd** Sep 29, 2021 at 5:52 pm ET • 6 min read



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UNFAIR LABOR CHARGE AGAINST NCAA MAY OFFER NLRB A NEW TEST CASE

BY DANIEL LIBIT, MICHAEL MCCANN NOVEMBER 16, 2021 12:00PM

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Six years after Northwestern football players were denied union rights by the National Labor Relations Board, a former Minnesota regent believes he's given the agency just what it needs to gut amateurism.

AP/PAUL BEATY

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Johnson v. NCAA (Aug.2021)

Federal Judge Refuses to Dismiss Action Seeking to Classify Student-Athletes as Employees

Wednesday, September 1, 2021

A case that may signal the continued erosion of the amateur status of college student-athletes will continue as the action in *Ralph “Trey” Johnson et al. v. NCAA* has survived the defendants’ motion to dismiss the complaint.

U.S. District Court Judge John Padova allowed the six student-athlete plaintiffs’ claims against Villanova, Fordham, Sacred Heart, Cornell and Lafayette to proceed as he concluded the schools had failed to show at this stage of the litigation that the student-athletes were not employees. The student-athletes brought their claims as a proposed collective or class action. They seek to be classified as employees pursuant to the Fair Labor Standards Act (FLSA) and state labor laws and be entitled to paid minimum wage.

Judge Padova’s 30-page order discussed familiar arguments made by the plaintiffs’ attorney Paul McDonald in *Berger v. NCAA*, a 2016 case decided by the U.S. Court of Appeals for the Seventh Circuit. In *Berger*, the Seventh Circuit rejected the “employee” argument, concluding the amateur status of college athletes prevented their classification as employees of their individual schools. Judge Padova rejected the schools’ argument that the student-athletes are enrolled as students and do not perform functions of an employee.



A Villanova Wildcats wide receiver catches a pass in a Sept. 9, 2017, game against the Temple Owls.
Photo by Mitchell Leff/Getty Images

NCAA Hit With Another Lawsuit Seeking Pay for Athlete’s Play (3)

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What Does It Mean If Athletes are Employees?

- 1. Title IX clearly implicated
- 2. Where will the money come from?
- 3. Next battleground: Covered by workers compensation?

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Contract Negotiation

ESPN

THE BOOM OF DEAD MONEY IN COLLEGE SPORTS



- According to an ESPN analysis of financial records of athletics departments at public universities, FBS programs spent more than \$533.6 million in dead money in an 11-year period from Jan. 1, 2010, to Jan. 31, 2021.
- Remarkably, the dead money total is actually much more than that. The financial records did not include payments for many of the coaches who were fired during or after the 2020 football and 2020-21 basketball seasons. In football alone, FBS schools committed another \$107.6 million in severance pay before mitigation to fired coaches and their staffs in 2020.

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