

Athletics Hot Topics

Higher Education Free Webinar Series

April 12, 2024 at 12:00p.m.

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Disclaimer

- We are not giving legal advice. Consult with your legal counsel regarding how best to address a specific situation.
- We are happy to answer questions about the material and address hypotheticals.
- We have no magic crystal ball, but we'll do our best to make predictions.

Agenda

- Title IX
- NIL
- Student-Athlete Employment
- Transgender Participation
- Sports Wagering



Athletic Compliance Resource Centers



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Resource Centers

Athletic Compliance

The athletic compliance regulatory framework is evolving in near real-time. As rules and regulations increase in quantity and complexity, and the costs of non-compliance are felt far beyond the playing field, institutions are left to balance being competitive and compliant.

Overview

Our athletic compliance team, comprised of attorneys, paralegals, consultants, and higher education specialists, believes that the best defense is a good offense. Our team can help your institution build a compliance program that meets today's obligations while keeping an eye on tomorrow.

Don't miss an update! Follow us on X (formerly Twitter).

Our team is particularly experienced in:

- **Title IX compliance**, including Gender Equity Reviews and the NCAA Policy on Campus Sexual Violence

RESOURCE CENTERS

- NEWS
- EVENTS
- PUBLICATIONS
- BLOGS
- PODCASTS
- SUBSCRIBE

Key Contacts

KEY RESOURCES

- Title IX and Athletics
- NIL Resources
- Student-Athlete Employment Resources
- Esports Resources

<https://www.brickergraydon.com/insights/resources/athletic-compliance>

Follow us on X!



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Title IX



Title IX

- Influx of Title IX Complaints
- Title IX and NIL
 - *Schroeder et al. v. University of Oregon* (filed December 2023)
 - Participation Opportunities
 - Financial Aid
 - Benefit and Treatment Areas (NIL)



Risk:

- OCR investigations
- Litigation



Ways to Manage:



- Develop a Title IX gender equity plan and review regularly
- Review how NIL operates on your campus - especially if you have collectives

NIL



NIL lawsuits

- *State of Tennessee and Commonwealth of Virginia v. NCAA* (E.D.Tenn.)
 - NCAA cannot enforce its “NIL-recruiting ban”
 - Preliminary injunction granted February 23, 2024
- *In re College Athlete NIL Litigation* (N.D.Cal.)
 - Retroactive NIL compensation
 - Class action granted November 3, 2023
- *Carter v. NCAA et al* (N.D.Cal.) and *Fontenot v. NCAA et al.* (D.Colo.)
 - Challenge to NCAA rule prohibiting pay-for-play
 - Filed December 7, 2023 and November 20, 2023)
- *Brantmeier v. NCAA* (M.D.N.C.)
 - Challenge NCAA prize money rule
 - Filed March 18, 2024
 - Track and Field and Olympic prize money (April 10, 2024)



NIL and Division I



“A letter to student-athletes from Charlie Baker” (December 2023)

- Suggested parameters of a subdivision:

- 1.Complying with Title IX, invest at least \$30,000 per year into an enhanced educational fund for at least half of the school's eligible student-athletes.
- 2.Work with peer institutions in this subdivision to create rules that may differ from the other rules in place in Division I. Those rules could offer different policies surrounding areas like scholarships, roster limits, recruiting, transfers and NIL.

Proposals effective August 1, 2024

- Voluntary registration
- Disclosure requirements
- Standardized contracts
- Comprehensive NIL education

Proposals that could be adopted as early as April 2024 (effective date unknown)

- Clearly define an NIL entity
- Expressly prohibit contact between NIL entities and prospects until the prospect signs a letter of intent, participates in summer activities or practices with the team, or enrolls at the school and attends classes.
- Schools would not be permitted to directly compensate student-athletes for the use of their NIL but could identify potential NIL opportunities for student-athletes and even facilitate deals between student-athletes and third parties.

NIL Trends

- Changes in state laws
 - Amending laws to explicitly allow schools (or prevent the NCAA from enforcing their rules related to) compensating student-athletes for their NIL
 - Example: Virginia House Bill 1505 (April 2024)
- Impact on hiring and coaching
- Moving NIL in-house



NIL Risk Management

Risk:

- NCAA Enforcement Actions
- Litigation



Ways to Manage:



- Stay updated on changes in NCAA rules and state law and then consider educating staff and coaches
- Remember: no pay for play, no direct institutional NIL payment, quid pro quo
- Review how NIL operates on your campus - especially if you have collectives!
- Revisit your institutional policy (if you have one)
- Have conversations with those on campus

Student-Athlete Employment



Student-Athlete Employment: NLRB

- Dartmouth College ruling (February 5, 2024)
 - Men's basketball players ruled "employees", allowing them to collectively bargain with Dartmouth
 - ✓ Work
 - ✓ Compensation
 - ✓ Control
 - Takeaway: Low bar for control and compensation
- University of Southern California case
 - Joint employer analysis (institution + conference + NCAA)
- For more info, check out our [three part series!](#)

Friday, January 20, 2023
8:00 a.m. Bus arrives at Leede Arena
8:30 a.m. Bus departs for '53 Commons
8:40 a.m. Meal at 53 Commons
9:15 a.m. Bus departs for Chipotle
1:00 p.m. Bus arrives at Chipotle
1:15 p.m. Bus departs for Jadwin Gymnasium
4:30 p.m. Practice at Jadwin Gymnasium
6:15 p.m. Bus departs for Westin Princeton
6:30 p.m. Arrive at Westin Princeton
7:00 p.m. Dinner at hotel
11:00 p.m. Lights out
Saturday, January 21, 2023
9:40 a.m. Wake up
10:00 a.m. Pregame meal/film at hotel
12:10 p.m. Depart hotel for Jadwin Gymnasium
2:00 p.m. BEAT PRINCETON
3:45 p.m. Postgame meal delivered to bus
4:30 p.m. Depart Princeton
10:00 p.m. Arrive at Leede Arena



Student-Athlete Employment: NCAA Lawsuits

- *Hubbard et al v. NCAA et al* (N.D. Cal.)
 - Antitrust lawsuit seeking “backpay” of *Alston* money
- *Johnson et al v. NCAA* (E.D. Penn.)
 - Fair Labor Standards Act lawsuit



“Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate.”

– Justice Brett Kavanaugh in his concurring opinion in *Alston*

Student-Athlete Employment: Risk Management

Risk:

- Agency actions
- If petitioned, potentially looking at collective bargaining with athletes
- Long-term implications



Ways to Manage:

- Consider training staff and coaches regarding unfair labor practices
- Conversations about how this may look on your campus



Other NCAA Lawsuits

- *State of Ohio et al v. NCAA*
 - Transfer rules case
 - Injunction issued December 2023
- Division I emergency legislation proposals
 - Generally, all undergrads can play immediately after transferring as long as certain academic requirements are met

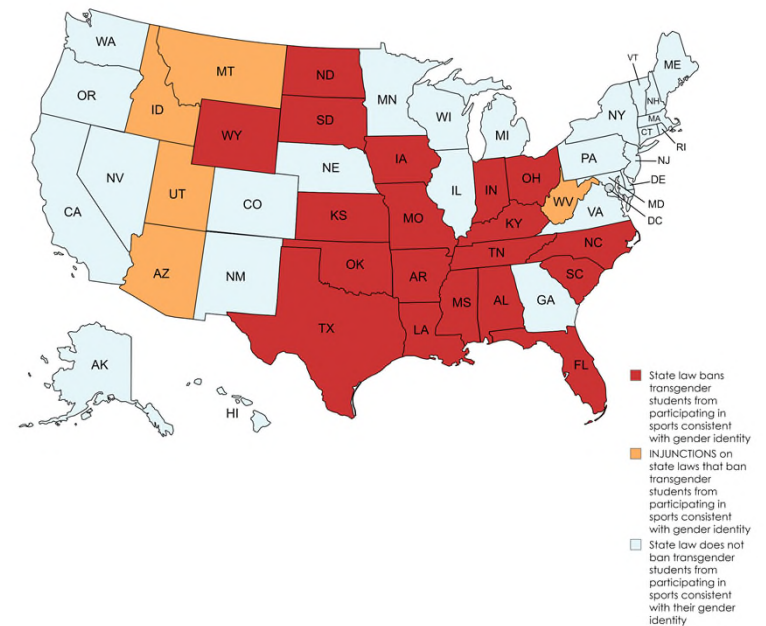


Transgender Participation



Title IX and State Laws

- Title IX Regulations
 - Current Regulations
 - Proposed Title IX Regulations (released April 6, 2023)
 - Allows schools flexibility to develop eligibility criteria
 - No blanket bans on transgender participation
 - Not sure it will go through
- State Laws
 - Almost half of the states have passed legislation prohibiting biological males from participating on women's teams
 - Do these laws violate Title IX?
 - Are these laws unconstitutional?



NCAA and NAIA Policies

- NCAA Policy
 - New policy aligns with the Olympic Movement
 - *Gaines et al v. NCAA et al* (N.D.Ga.) filed March 14, 2024
- NAIA Policy
 - New as of April 8, 2024
 - Prohibits biological males from participating on female designated teams



TRANSGENDER PARTICIPATION POLICY

The NAIA supports fair and safe competition opportunities for all student-athletes. Title IX ensures there are separate and equal opportunities for female athletes. As a result, the NAIA offers separate categories of competition in all sports except for competitive cheer and competitive dance, which are both co-ed.

Student-athletes may participate in NAIA competition in accordance with the following conditions.

- A. Participation by students in sports designated as male by the NAIA:
All eligible NAIA student-athletes may participate in NAIA-sponsored male sports.
- B. Participation by students in sports designated as female by the NAIA:
Only NAIA student-athletes whose biological sex* is female may participate in NAIA-sponsored female sports. They may participate under the following conditions:
 1. A student who has not begun any masculinizing hormone therapy may participate without limitation.
 2. A student who has begun masculinizing hormone therapy may participate in:
 - a. All activities that are internal to the institution (does not include external competition), including workouts, practices, and team activities. Such participation is at the discretion of the NAIA member institution where the student is enrolled; and
 - b. External competition that is not a countable contest as defined by the NAIA (per NAC Policy Article XXV, Section A, Item 12). Such participation is at the discretion of the NAIA member institution where the student is enrolled.

An NAIA institution that has a student-athlete who has begun masculinizing hormone therapy must notify the NAIA national office. The national office will take the necessary steps to provide appropriate privacy protections.

This policy will be subject to review in light of any legal, scientific, or medical developments.

Sports Wagering



Sports Wagering

- Rise in sports betting in student-athletes and across campus.
- NCAA's new campaign "Draw the Line" launched in March 2024
- Penalties for sports wagering in violation of the NCAA bylaws have been modernized
- Focus on prop bets:
 - Preventing harassment of players
 - Game integrity
 - Address the negative impacts of problem gambling

"Sports wagering activity is widespread on college campuses — 67% of students living on campus are bettors and tend to bet at a higher frequency. 41% of college students who bet on sports have placed a bet on their school's teams and 35% have used a student bookmaker."



Questions?

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Thank You

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