

June 22, 2023
12:00-1:00 PM CST

ATHLETIC COMPLIANCE UPDATE

*CLE Webinar Series Presented by
Bricker Graydon and Southern
Illinois University School of Law*

DISCLAIMER

- We are not giving legal advice today.
- Please consult with your legal counsel regarding specific situations.
- Use chat function to ask general questions and hypotheticals.
We encourage questions!

ABOUT ME & OUR PRACTICE

Our team is particularly experienced in:

- Title IX compliance and investigations, including the NCAA Policy on Campus Sexual Violence (check out our Title IX and athletics resource page here)
- Operationalizing Name, Image and Likeness
- Student-athlete safety and well-being
- Enforcement investigations
- Eligibility reviews
- Policy and procedure reviews including student-athlete handbooks
- Intellectual property portfolio development and management
- Multimedia streaming rights agreements, product licensing, and sponsorship
- Facilities compliance
- E-sports

Background

- Former student-athlete
- Mid-American Conference
- LSU Athletic Compliance Office



Athletic Compliance Resource Center

Athletic Compliance, Ohio NIL, NIL, name, image, likeness, Title IX, sexual misconduct, NCAA, e-sports

Bricker & Eckler Attorneys At Law

UPCOMING EVENTS

THE ATHLETIC DIRECTOR'S TOOLKIT SERIES:

BALANCING COMPLIANCE AND COMPETITIVE SUCCESS IN AN ERA OF CHANGE

For athletic directors, athletic administrators, compliance, general counsel and other positions on campus that works with athletics.

All Noon-1:30p.m. EST

Session 1: Title IX and Athletics | What Every Athletic Administrator Needs to Know

- Tuesday, July 11, 2023

Session 2: Student-Athlete Conduct and Health, Safety, and Well-being

- Thursday, July 13, 2023

Session 3: Athletic Operations and Revenue Generation in an Ever-Changing Climate

- Tuesday, July 18, 2023

Session 4: The Future of College Athletics | Practical Tips and Takeaways in Anticipating the "New Normal"

- Thursday, July 20, 2023



**The Athletic Director's Toolkit Series:
Balancing Compliance and Competitive...**

The Athletic Director's Toolkit Series: Balancing Compliance and Competitive Success in an Era of...

Bricker & Eckler Attorneys At Law

AGENDA

- 1** Title IX and Athletics Update
- 2** Name, Image, and Likeness
- 3** NCAA Attestation and Forms
- 4** Student-Athlete Employment
- 5** Sports Betting

***TITLE IX AND
ATHLETICS
UPDATE***

TITLE IX ATHLETIC COMPLIANCE

1

ATHLETIC PARTICIPATION

2

ATHLETIC SCHOLARSHIPS

3

BENEFIT & TREATMENT AREAS

1. Substantial Proportionality: whether the percentage of athletic participation compared to full-time undergraduate enrollment is "substantially" proportional
2. History and Continuing Practice: whether you are adding opportunities for the underrepresented sex
3. Interests and Abilities of Students: whether you are fully accommodating the interests and abilities of the underrepresented sex

TITLE IX REGULATIONS

U.S. Department of Education
Office for Civil Rights
February 2023

Title IX and Athletic Opportunities in Colleges and Universities

A Resource for Students, Coaches, Athletic Directors, and School Communities

INCLUDED IN THIS RESOURCE

- Background on Title IX 2
- Evaluating Your School's Athletic Program 3
 - Benefits, opportunities, and treatment for men's and women's teams 3
 - Athletic scholarships and financial assistance 6
 - Meeting students' athletic interests and abilities 8
- What to Do if You Think Your School's Athletic Program Violates Title IX 12

This resource is designed by the [Office for Civil Rights \("OCR"\)](#) of the U.S. Department of Education ("Department") to help college and university communities ("schools"), including students, coaches, athletic directors, and school officials evaluate whether a school is meeting its legal duty to provide equal athletic opportunity based on sex consistent with Title IX of the Education Amendments of 1972 ("Title IX") and the Title IX regulations.¹

This resource explains the rights that students have to participate in intercollegiate, intramural, or club athletic programs free from discrimination based on sex and may help you evaluate whether your school's athletic program is providing equal opportunity consistent with Title IX.

If you believe that your school may not be providing equal athletic opportunities based on sex, you may file a complaint through your school's grievance procedures or directly with OCR, as described on page

¹ Title IX says: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." You can find the full Title IX statute at [20 U.S.C. §§ 1681-1688](#). You can find the Department's Title IX regulations at [34 C.F.R. Part 106](#). The Title IX athletics regulation is at [34 C.F.R. § 106.41](#) and the athletic scholarships regulation is at [34 C.F.R. § 106.3703](#). In addition, the Department has published several guidance documents on Title IX and athletics that are linked in the Appendix. The examples and questions in this resource draw in part from those guidance documents but are not intended to be comprehensive of all of the guidance documents linked in the Appendix. While this resource focuses on men's and women's teams, please note that schools must also ensure equal opportunity based on sex on coeducational teams.

A Resource for Students, Coaches, Athletic Directors, and School Communities 1

- Keep an eye on DOE
 - "The Department will engage in a separate rulemaking to address Title IX's application to the context of athletics and, in particular, what criteria recipients may be permitted to use to establish students' eligibility to participate on a particular male or female athletic team"
- OCR released resources to assist with Title IX and Athletics

CASE UPDATES

Participation Requirement (three-prong test)

- *Balow v. Michigan State Univ.* (6th Cir. Feb. 1, 2022)
 - Participation Prong 1: emphasis on participation gap and a "viable team"
- *Navarro et al. v. Fla. Inst. of Tech.* (M.D. Fla. Feb. 17, 2023)
 - Whether esports amounted to a genuine participation opportunity for Title IX counting purposes
 - 2008 Guidance Letter and *Quinnipiac* case



THE ATHLETICS NPRM

- Addresses participation based on gender identity
- REMINDER:
 - These are proposed regulations. None of this has been finalized, and you are not required to comply until finalization has occurred (likely October 2023)
 - Cannot possibly cover all 116 pages of the draft document here, but I will try and focus on what we believe are the biggest changes in terms of impact

OLD RULE IS STILL GOOD!

- Still permits schools to offer separate male and female teams (34 CFR 106.41(b))
- Must provide equal athletic opportunities to women and men:
 - Participation (the “three prong test”)
 - Athletic Scholarships
 - Other treatment and benefit areas (the “laundry list” items)



WHAT DOES THE RULE SAY?

NEW 106.41(b)(2)

If a recipient adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity, such **criteria** must, for each **sport**, **level of competition**, and **grade or education level**: (i) be substantially related to the achievement of an important **educational objective**, and (ii) **minimize harms** to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.

***NO BLANKET OR ONE-SIZE-FITS-ALL BAN ON
TRANSGENDER STUDENTS FROM PARTICIPATING***

KEY TAKEAWAYS

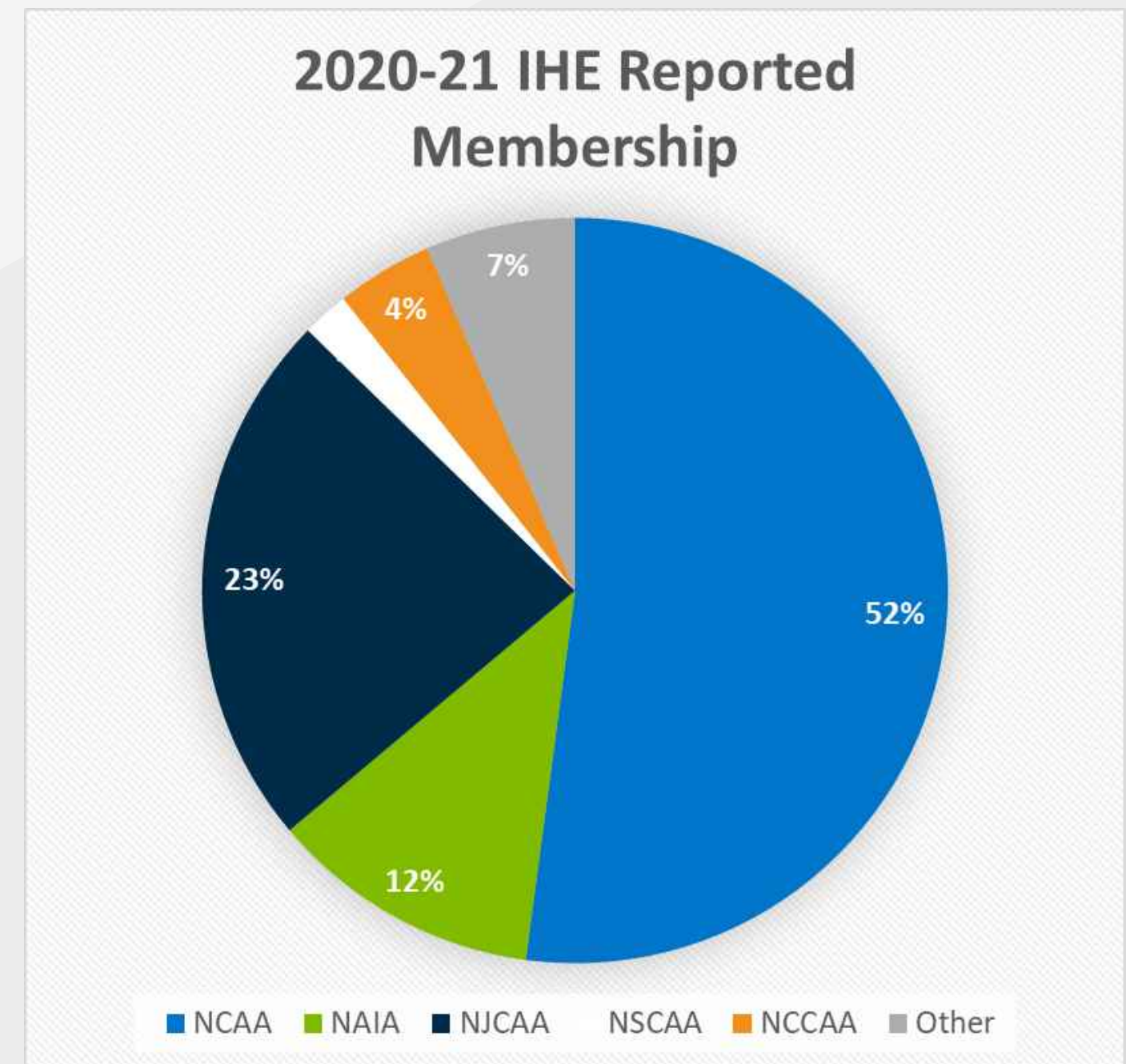
- No blanket or one-size-fits-all ban on transgender students from participating
- College sports: "The Department expects that sex-related criteria that limit participation of some transgender students may be permitted, in some cases, when they enable the school to achieve an important educational objective, such as fairness in competition, and meet the proposed regulation's other requirements."

HOW THIS IMPACTS COLLEGES AND UNIVERSITIES

- It depends on a variety of factors! But generally, it will only require updating policies or training materials
- First, are you looking at your intramural or club teams? Or your varsity teams?
- Second, *who* regulates the team's athletic eligibility?
 - For all – your State
 - Intramural/club – likely institution, so review your policy if you have one
 - Varsity – most likely an athletic association, maybe your conference and institution

INTERCOLLEGIATE SPORTS

- These types of decisions and policies are often made at the conference and/or national governing body level (NCAA)
- But, keep in mind that compliance is on the *institution*



NCAA POLICY

- In 2022, the NCAA replaced their policy to a sport-by-sport approach.
- Several sport governing bodies that set criteria for certain non-school-based national and international competition, as well as postsecondary athletic competition, have announced plans to review their policies or have adopted or applied new policies regarding sex-related eligibility criteria:
 - USA Gymnastics
 - USRowing
 - USA Volleyball



Transgender Student-Athlete Participation Policy

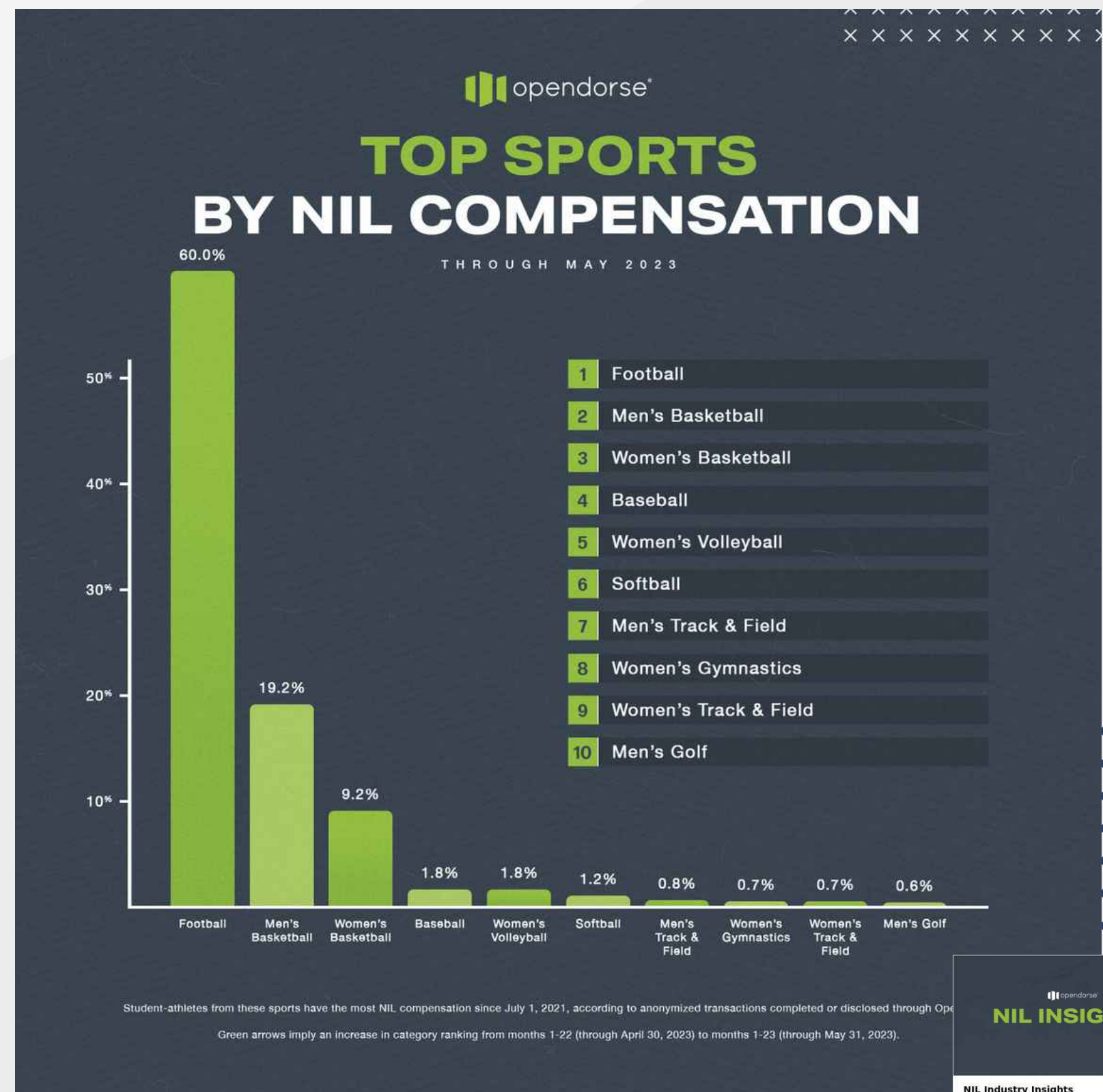
At its January 19, 2022 meeting, the NCAA Board of Governors updated the transgender student-athlete

 NCAA.org

***NAME, IMAGE,
AND LIKENESS
UPDATE***

THE STATS

- Football takes the lion's share, then men's basketball
- Around 14% of NIL compensation goes to women's athletes... more later!

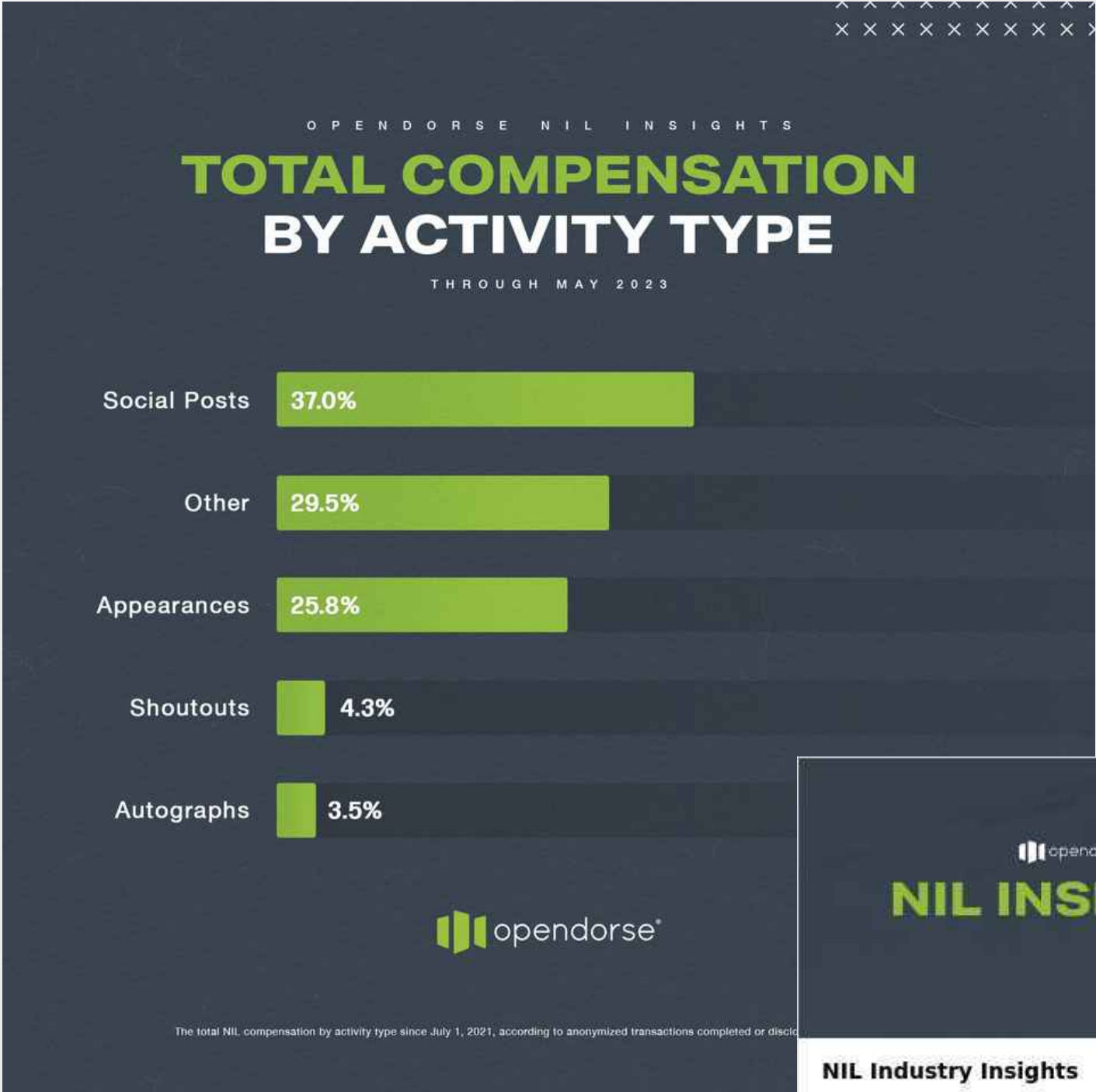


THE STATS

Deals at every Level



What is "Other"?



NIL Industry Insights
Thousands of college athletes use Opendorse to receive and disclose NIL deals, providing monthly insights into the industry.

NCAA GUIDANCE

- **Boosters - Recruiting inducements**
 - Division I May 2022 NIL Guidance
 - Division II July 2022 NIL Guidance
 - Division III October 2022 NIL Guidance
 - NCAA Division I and II Third Party Involvement Policy Q&A
- **Institutional Involvement**
 - NCAA Division I Institutional Involvement in a Student-Athlete's NIL Activities



NCAA INTERIM GUIDANCE ON THIRD PARTY INVOLVEMENT

**Collective
=
"booster"**



A representative of athletics interests ("booster"), in part, is defined as an individual, independent agency, corporate entity (e.g., apparel or equipment manufacturer) or other organization promoting the institution's intercollegiate athletics program.



NCAA INTERIM GUIDANCE ON THIRD PARTY INVOLVEMENT

For All



NIL agreements must be based on an independent, case-by-case analysis of the value that each athlete brings to an NIL agreement as opposed to providing compensation or incentives for:

- enrollment decisions (e.g., signing a letter of intent or transferring),
- athletic performance (e.g., points scored, minutes played, winning a contest),
- achievement (e.g., starting position, award winner), or
- membership on a team (e.g., being on roster).

For Recruits



No conversations between Boosters and recruits (or family members thereof for recruiting purposes)



NIL agreements between a recruit and a Booster may not be guaranteed or promised contingent on initial or continuing enrollment at a particular institution.



Institutional coaches and staff may not organize, facilitate, or arrange a meeting between Boosters and a recruit.



Institutional coaches and staff may not communicate directly or indirectly with a recruit on behalf of a Booster.

For Current



NIL agreements between a recruit and a Booster may not be guaranteed or promised contingent on initial or continuing enrollment at a particular institution.

INSTITUTIONAL INVOLVEMENT

Permissible and Impermissible situations under:

- EDUCATION AND MONITORING
- SUPPORT FOR STUDENT-ATHLETE NIL ACTIVITY
- SUPPORT FOR NIL ENTITY/COLLECTIVE
- NEGOTIATING, REVENUE SHARING AND COMPENSATING



SUPPORT FOR STUDENT-ATHLETE NIL ACTIVITY

- Assistance with deal
 - Can inform student-athletes about potential NIL opportunities
 - Can work with an NIL service provider to administer a "marketplace"
 - Cannot engage in negotiations
- Services and equipment
 - Can provide stock photos/graphics and arrange a space for student-athletes to meet collectives
 - Cannot provide free services or offer equipment that are not available to the general student body
- Promotion
 - Can promote student-athletes' NIL activities, but...
 - Cannot allow student-athletes to promote while they are participating in required athletic activity



SUPPORT FOR NIL ENTITY/COLLECTIVE

- School personnel
 - Can assist an NIL entity with fundraising through appearances or by providing autographed memorabilia but cannot donate cash directly
 - Cannot be employed by or have an ownership stake in an NIL entity.
- Requesting funds from donors
 - Can request donors provide funds to collectives and other NIL entities, provided the schools do not request that those funds be directed to a specific sport or student-athlete.
- Tickets and suites
 - Can provide tickets or suites to NIL entities through sponsorship agreements, provided...



NIL RECENT DEVELOPMENTS

NCAA Enforcement

NCAA Infractions Case regarding Miami (FL) women's basketball had an NIL piece related to boosters + recruiting

Official Athletic Booster Clubs

Texas A&M is believed to be the first school whose official athletic booster organization also is directly fundraising NIL opportunities in this manner.

*New standard of review for evaluating NIL violations

IRS ON NIL COLLECTIVES

- 12-page memo clarifying that donations to collectives are not tax exempt
 - Because the NIL collectives substantially benefit the private interests of student-athletes and those benefits are “not incidental both qualitatively and quantitatively to any exempt purpose.”
- Dozens of collectives have been granted this status and are receiving millions in donations from boosters who are under the impression that their gifts fall under tax deduction.
- What does this mean for 501(c)(3) collectives?



LEGISLATION: WHERE WE ARE HEADED

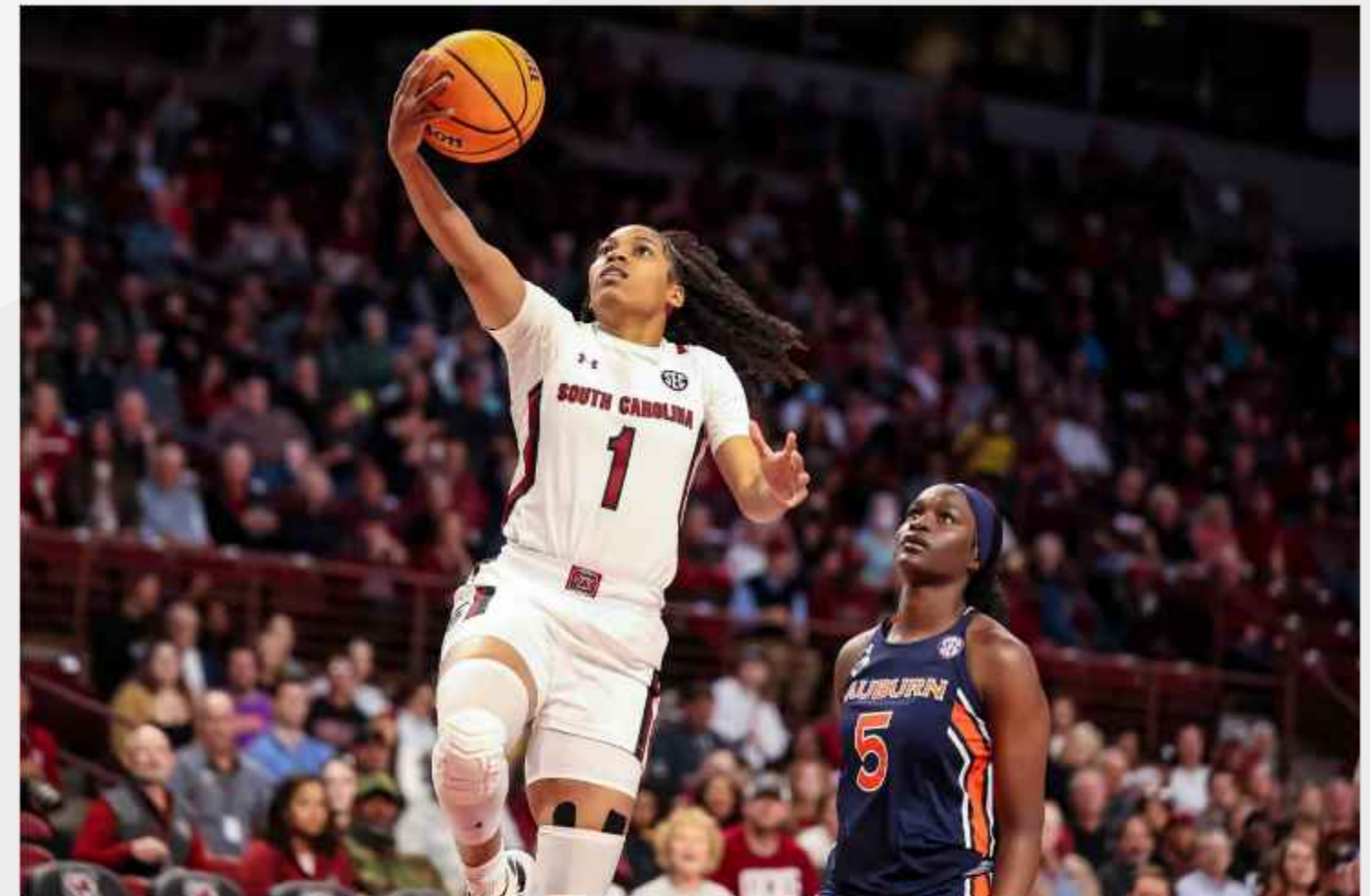
- State Law Rollback
- Federal Legislation?
 - NCAA President Baker is hopeful that there will be national NIL framework-whether through Congress or the NCAA - by the end of the year
 - The association wants:
 - registry of deals' terms
 - certification of agents
 - mandate of a uniform standard contract for the deals



TITLE IX AND NIL?

- Closer a collective is aligned with an institution, the more likely Title IX will apply.
- As state laws are repealed, and institutions move closer to leading collectives, the Title IX risk will be even greater.

79% of compensation for women's sports athletes come from brand endorsement deals



NIL Collectives Are Slacking On Supporting Women's Sports

Only 34% of existing collectives offered compensation to women's sports athletes so far, an Opendorse report found.

Front Office Sports / Jan 10

NCAA
ATTESTATION &
FORM UPDATES

NCAA ATTESTATION

1

**ATTESTATION
OF
COMPLIANCE**

Division I and
Division III only

2

**DIVERSITY,
EQUITY AND
INCLUSION
REVIEW**

Division I only

3

**CAMPUS
SEXUAL
VIOLENCE
ATTESTATION**

All members

ATTESTATION OF COMPLIANCE

- Division I and Division III only
 - Each DI and DIII school or conference attest to compliance requirements for member schools, collaboration with the NCAA when an issue arises, and the importance of creating a culture of compliance on member campuses.
- Deadline: October 15
- Requirements: Each chancellor/president and director of athletics must sign

DIVERSITY, EQUITY, AND INCLUSION

- Division I institutions and conferences
- Deadline: August 1, 2023
- Responsibility to conduct a DEI review every four years as outlined in NCAA Bylaws 20.2.4.3 (institutions) and 20.3.4.2 (conferences).
- Requirements: Each chancellor/president and director of athletics must sign



WHAT DOES THE DEI REVIEW REQUIRE?

- There is no specific form
 - "The DEI Review Framework offers a sample format that schools can use to conduct a meaningful DEI review, adjusting it to best serve the individual campus."

Diversity Equity and Inclusion Review Framework



Should gender equity/Title IX be part of the DEI review?

Yes.

Are there resources in addition to the NCAA DEI Review Framework that would be helpful to schools?

In February 2023, the Office for Civil Rights released three new resources to support equal opportunity in athletic programs consistent with Title IX of the Education Amendments of 1972. One of those resources focuses on equity in college sports: [Title IX and Athletic Opportunities in Colleges and Universities A Resource for Students, Coaches, Athletic Directors, and School Communities \(PDF\) \(ed.gov\)](#)

NCAA POLICY ON CAMPUS SEXUAL VIOLENCE

- All members!
- Deadline: November 3, 2023
- Requirements: Each chancellor/president, director of athletics and Title IX coordinator must sign



NCAA Board of Governors Policy on Campus Sexual Violence

The NCAA is a voluntary membership organization dedicated to promoting and developing its core values.

 NCAA.org

NEW POLICY ITEMS

4. Annual student-athlete disclosure/questionnaire
5. Institution takes reasonable steps to confirm student-athlete is being truthful
6. Written policy about collecting information from other schools

WHAT MISCONDUCT IS COVERED?

- Resulted in discipline through a Title IX proceeding
- Resulted in criminal conviction for sexual, interpersonal or other acts of violence



NCAA FORMS - DIVISION I

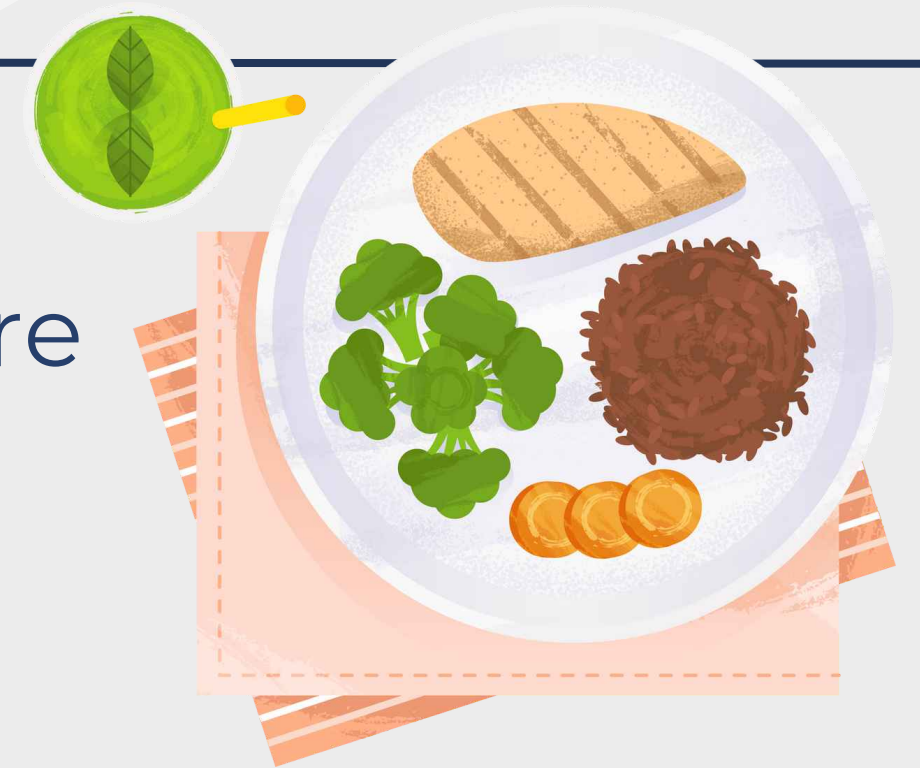
NCAA DIVISION I ANNUAL LIST OF REQUIRED FORMS AND ACTIONS

- January 15 deadline:
 - NCAA Membership Financial Report (President & AD)
 - NCAA IPP Health and Safety Survey (Athletics Health Care Administrator)
- February 15 deadline:
 - FBS Attendance Report (President & AD)
- June 1 deadline:
 - Federal Graduation Rate (Designated Institutional Personnel)
 - NCAA Graduation Success Rate (Designated Institutional Personnel)
- July 25 deadline:
 - Sports Sponsorship and Demographic Report (AD)
- August 1, 2023 (NOT ANNUAL - every 4 years)
 - DEI review
- August 31 deadline:
 - Report of Uses for Revenue Distribution (Designated Institutional Personnel & Conference)
- September 1 deadline:
 - Membership dues (AD, fiscal staff)
- Eight weeks after first day of classes:
 - Academic Progress Rate and Academic Performance Census (Designated Institutional Personnel)
- October 15 deadline:
 - EADA Report (AD and Designated Institutional Personnel)
 - Goes to the United States Federal Government Office of Postsecondary Education
- November 3 deadline:
 - Policy on Campus Sexual Violence Attestation
- Annually:
 - NCAA Catastrophic Sport Injury Reporting (Designated Institutional Personnel)
 - Concussion Reporting (Designated Institutional Personnel)
 - Based on school's policy: Athletically Related Income and Benefits
 - On file at the school

DI TRANSFORMATION COMMITTEE

Adopted:

- Holistic student-athlete benefits model and more health and safety guidelines
- More membership requirements
 - Education for student-athletes and staff on:
 - Mental health.
 - Strength and conditioning.
 - Nutrition.
 - Name, image and likeness.
 - Financial literacy.
 - Transfer requirements.
 - Career preparation.
 - Diversity, equity, inclusion and belonging.
 - Campus sexual violence prevention.



NCAA FORMS - DIVISION II & III

Division II and III Compliance Forms

- October 15 deadline:
 - EADA Report (AD and Designated Institutional Personnel)
 - Goes to the United States Federal Government Office of Postsecondary Education
- November 3 deadline:
 - Policy on Campus Sexual Violence Attestation

***STUDENT-
ATHLETE
EMPLOYMENT***

HISTORY OF AMATEURISM

- The NCAA model is based on amateurism : no "pay for play" or employment
- Former student-athletes started suing the NCAA based on antitrust theories (Sherman Act)
- Many cases supported this notion up until these past few years
- First case to really break the mold is *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015).
 - Holding that NCAA compensation rules for Division I men's basketball players and FBS football players violated federal antitrust laws

MORE LAWSUITS - FLSA

- *Berger v. NCAA*, 843 F.3d 285 (7th Cir. 2016)
 - Holding that that student athletes were not employees and are not covered by the FLSA
- *Dawson v. NCAA*, 932 F.3d 905 (9th Cir. 2019)
 - Holding a student-athlete in a football program was not an employee of the NCAA or Pac-12 under the FLSA
- *Johnson v. NCAA*, 556 F.Supp.3d 491, 512 (E.D. Pa. Aug. 25, 2021)
 - *Currently being appealed to the Third Circuit*



JOHNSON V. NCAA

- Facts: Former and current Division I student-athletes sued the NCAA and member institutions seeking wages for their participation in athletics under FLSA.
- District court: Granted the institution's and NCAA's motion to dismiss and the Plaintiff's are appealing that decision.
- Appeal level: At oral arguments, the judges asked interesting questions surrounding:
 - Title IX
 - Substantial control
 - Scholarships

If the student-athletes succeed on appeal, what could this mean for those campuses?

ALSTON AND BEYOND

- *Alston v. NCAA*, 141 S. Ct. 2141 (2021)
- Ongoing cases:
 - *In re College Athlete NIL Litigation*, Case No. 4:20-cv-03919-CW (ND California)
 - Related to NIL "backpay"
 - *Hubbard, et al. v. NCAA, et al.*, Case No. 4:23-cv-01593 (ND California)
 - Related to education-related compensation (Alston \$) "backpay"
 - *Choh, et al. v. Brown University, et al.*, 3:23CV00305

AGENCY ACTION

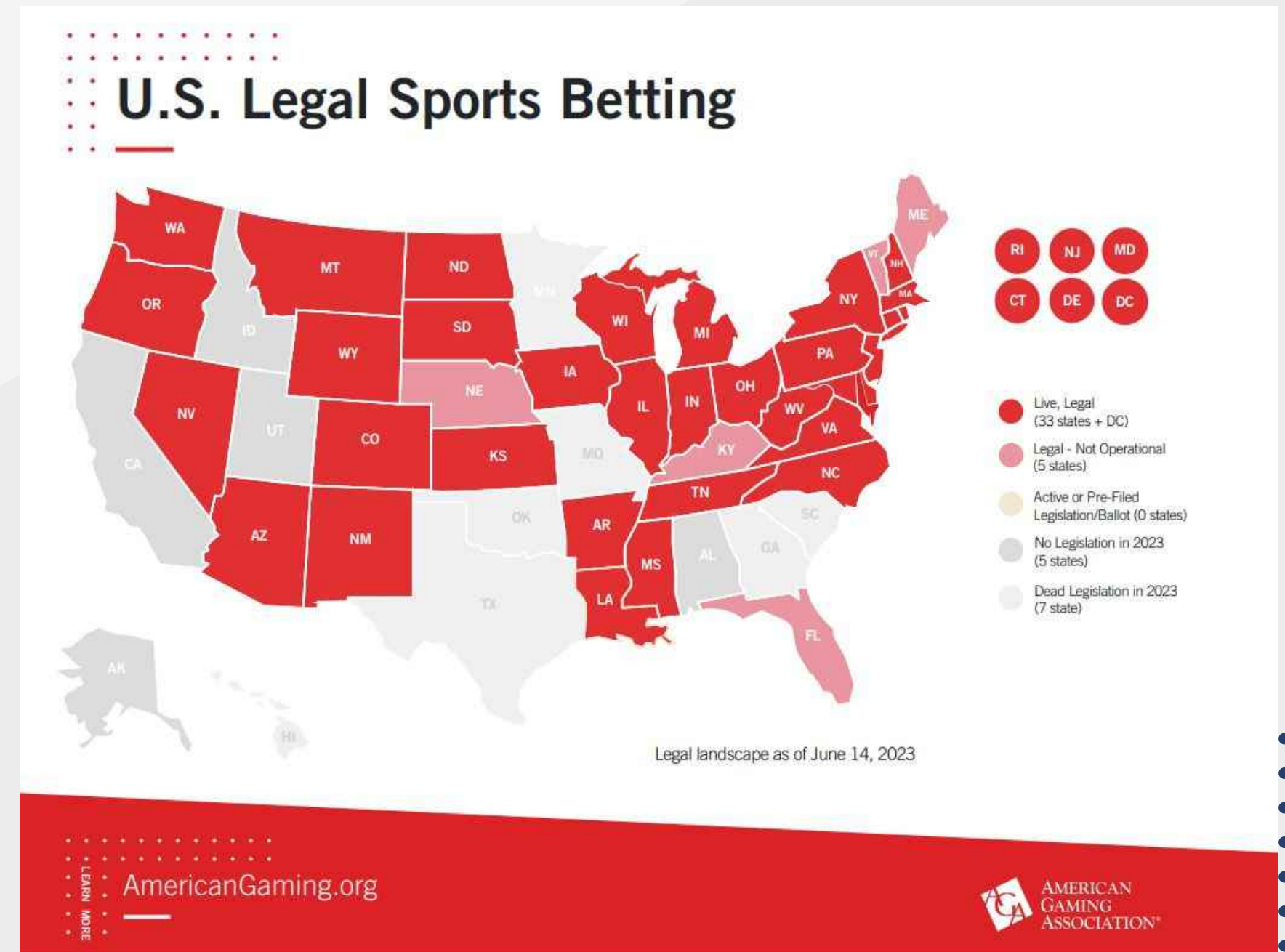
- Last month, the National Labor Relations Board (NLRB) filed a complaint against the NCAA, Pac-12 Conference and the University of Southern California (USC) for unfair labor practices.
 - Opportunity to collectively bargain



SPORTS BETTING

WHAT'S THE BET?

- Becoming more of an issue with the rise of legalized sports betting
- Still impermissible under NCAA Bylaws (NCAA Bylaw 10.02.1)
- Could face penalties under state law, too



RECENT EVENTS

- Different organizations are paying close attention to the betting markets
 - U.S. Integrity
- Recent investigation into baseball - ended up with coaches being fired
- What can your campus do to avoid this situation?
 - Education!



MORE UPDATES

OTHER LEGAL ISSUES



- Revenue sharing
- Conference realignment
- Student-athlete health, safety, and well-being
- Student-athlete discipline and speech
- Student-athlete privacy

UPCOMING EVENTS

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THANK YOU!



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