

## Fashion Law

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# Are College Athletes the Next Fashion Stars?

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As fashion brands continue to enlist celebrities and influencers to promote their products, one group that has historically remained beyond their reach is NCAA college athletes. But that has all changed in light of a recent Supreme Court decision and a dramatic change in the NCAA's position. College athletes are about to become important representatives of brands, including their own, because they are now permitted to be paid for the use of their name, likeness or image. Making sense of the new rules promises to be a difficult task for attorneys, business executives and administrators in the fashion industry and elsewhere. This article provides a general outline of a rapidly-evolving new industry.

**NCAA's Historical Restrictions on Certain Types of Athlete Compensation Has Been Removed.**

Throughout its history, the NCAA has maintained a strict amateur code towards college athletes, seeking to enforce, although not always successfully, a clear and deliberate distinction between students and professionals. The NCAA, which was founded in 1906 and assumed its present name in 1910, had organizational bylaws that prohibited student athletes from receiving any compensation for their services. Violations were commonplace even during the first half of the 20th century, and it was not until the 1948 "Sanity Code" that NCAA policy permitted athletic scholarships or financial aid to athletes in an early attempt to regulate the corruption.

The landscape dramatically and irrevocably changed on June 21, 2021, with the issuance of the U.S. Supreme Court's 9-0 decision in *NCAA v. Alston*. The *Alston* lawsuit began in October 2014, when a group of then-current and former college athletes, including former West Virginia running back Shawne Alston, filed a feder-



al class action against the NCAA alleging federal antitrust violations that illegally restricted the ability of student athletes to be paid. In 2019, a Northern District of California court ruled in favor of the student athletes. The Ninth Circuit Court of Appeals affirmed, but the NCAA appealed to the Supreme Court. The NCAA argued before the Supreme Court that its rules to preserve amateurism in college sports served a legitimate non-commercial objective, namely, to promote higher education.

The Supreme Court unanimously disagreed. A majority opinion authored by Justice Gorsuch found that the NCAA impermissibly restricted compensation to

its student athletes in violation of the Sherman Act. The court upheld the trial court's injunction prohibiting the NCAA's limits on education-related benefits because they unreasonably restrained trade.

In a concurring opinion, Justice Kavanaugh compared the NCAA's policy to illegal "price-fixing labor," and voted to uphold the finding of an antitrust violation "because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work." To be clear, the *Alston* decision did not address the NCAA's ban on direct payments from the school to the athlete, so-called "pay-for-play." That remains impermissible, although potentially subject to future challenges based on Justice Kavanaugh's concurring opinion.

The NCAA's response to *Alston* was swift. Just nine days later, the NCAA adopted an interim policy that allowed collegiate athletes to profit from their name, image and likeness (commonly referred to as NIL) for the first time in NCAA history. Under the interim policy, which took effect on July 1, 2021, athletes can engage in NIL activities that are consistent with the law of the state where the school is located. In such jurisdictions, athletes can use professional services providers, including as

agents, attorneys, marketing consultants and brand management companies to help them exploit their NILs.

**The Impact of the NIL Policy Change.** Athletes have quickly started to take advantage of the new NCAA NIL standards. Dontae Allen and Jordan Bohannon, who play basketball for the University of Kentucky and University of Iowa, respectively, are among those who have already launched their own clothing lines. Nick Saban, the head football coach at the University of Alabama, boasted that quarterback Bryce Young, who has yet to play a single down for the Crimson Tide, has already signed endorsement deals worth in excess of \$800,000. Athletes are also being signed up as social media influencers and to appear at summer camps and autograph shows. For example, although relatively unknown by sports fans compared to other college athletes, identical twins Haley and Hanna Cavinder, who play basketball at Fresno State, are set to leverage their millions of TikTok followers into hundreds of thousands of dollars per year in NIL deals.

These are just a few instances of brands looking to utilize NCAA athlete marketing potential. Keep in mind, an athlete's NIL may have standalone value, but the

value is greatly enhanced if it can be combined with the school's logos, mascots and other intellectual property. Aware of the value-added concept of combining team and individual merchandising, schools are already figuring out ways to cut themselves in on the new revenue stream. For example, on July 20th, the University of North Carolina teamed up with The Brandr Group to launch the first "group licensing program." North Carolina athletes can join on a voluntary basis (as opposed to marketing their NIL on their own), and the school will contribute its trademark, which will allow team jerseys to be sold with the athletes' last name on them. For decades, products that combine team logos and player names and uniform numbers have accounted for a large portion of licensed sports merchandise sales, but until now, those sales were restricted to professional sports. The University of Wisconsin has partnered with Opendorse, a platform specifically built to help athletes maximize their value.

Another licensing giant, the University of Michigan, has not itself gotten involved, but its official licensor, M Den, is signing up players under the new NIL rules and combining the NIL rights with their existing license to create and sell custom official jerseys.

The Detroit News reported that, as of July 19, 2021, 72 Michigan football players had signed up with M Den, which was selling jerseys for \$120 or \$180 each, with at least \$10 going to the athlete whose name was ordered for the custom jersey.

Powerhouse sports agents are also getting in on the action. Steiner Sports signed up Oklahoma quarterback Spencer Rattler and quickly booked his appearance at a sports collectors convention, while Vayner Sports got Clemson quarterback DJ Uiagalelei a gig promoting Bojangles chicken sandwiches.

Although there is money and opportunity abound, there are also major issues for licensors in the form of a maze of state laws, and individual school regulations. Remember, NCAA policy requires athletes' NIL deals to comply with both school regulations and state law in order for the athlete to remain eligible to compete. As this article is written, close to 30 states have passed NIL laws, most of them in the last few weeks, with varying effective dates and more state regulation to come very soon.

Differences in state laws will certainly affect the value of a licensor's offer to an athlete. For example, Georgia's NIL statute, passed in May 2021, empowers Georgia

colleges to elect a requirement that all student-athletes contribute at least 75% of the compensation generated into an escrow fund to be shared by all athletes at that college. New Mexico's law gives athletes the right to choose their own brand of footwear, a departure from the usual practice where the college enters into an endorsement deal that supplies the same footwear brand to all its athletes. Some states ban athletes from endorsing tobacco, alcohol or marijuana-related products. Athletes are required to disclose their NIL deals in some states, but not in others. Is this complicated enough? At the NCAA's request, federal legislation may also be forthcoming in the next year or two.

As for individual school policy considerations, take the University of Florida. Agreements touting sports wagering and performance-enhancing drugs (even legal ones) will not be permitted and the duration of any NIL agreement cannot extend beyond the athlete's participation in the school athletic program. The University of Alabama's policy forbids any opportunities that conflict with academic or team-related activities, as well as the use of any registered marks, logos, verbiage or designs owned and protected by the University unless there is prior written permission.

The issue of conflict with university sponsors is certain to be tested in the near future. Some licensors will undoubtedly seek to pursue "guerilla" marketing deals in which an athlete is asked to wear a brand that competes with their school's official sponsor.

The key takeaway is that while student athletes can now be compensated to promote a fashion brand, including their own, any such business arrangements must be carefully evaluated to be sure they comply with applicable state law and individual school policies.

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