Court to decide whether the *Tinker* standard "applies to student speech that occurs off campus."

Refusing to draw a bright line, the majority stated that it did not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus, as the school's regulatory interests "remain significant in some off-campus circumstances." While the Court declined to outline a precise list of school-related off-campus activities that could be properly regulated by a school to prevent substantial disruption or protection of the school community, Justice Breyer did note that, generally speaking, the leeway the First Amendment grants to schools in light of their special characteristics is "diminished" when it comes to off-campus protected speech.

Ultimately, the Court ruled that Levy's statements, albeit vulgar, were protected speech. The Court found that because the posts were made outside of school hours and off school grounds, sent to a targeted audience, and did not specifically mention the school's name or target a member of the school community, and since the school's interest in teaching good manners and its evidence of disruption or loss of team morale was unconvincing, the posts at issue did not create a substantial interference that would overcome Levy's right to free expression under *Tinker*.

As this case showed, beyond the (potential) disturbance a JV cheerleader may have caused with a less-than-spirited post about her school lies the constitutional right to free speech. In closing, Breyer puts aside the crude speech and becomes a cheerleader for team SCOTUS on the importance of First Amendment rights: "[W]e cannot lose sight of the fact that, on what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated."

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Articles

Show Them the Money: Legal Issues and Implications of Illinois' Student-Athlete Endorsement Rights Act

By Cameron D. Turner and Nathan J. Law, of Segal McCambridge Singer & Mahoney, Ltd.

On June 29, 2021, Illinois Governor J.B. Pritzker signed Senate Bill 2338 into law as Public Act 102-0042, the "Student-Athlete Endorsement Act" (the "Act"). The Act makes Illinois the twentieth state to allow collegiate athletes to earn compensation for the use of their names, images, and likenesses ("NIL") from endorsement deals. This article examines PA 102-0042 to guide athletes, universities, potential sponsors, and their respective counsel and further discusses the Illinois statute's broader impact on intercollegiate athletics.

According to Pritzker, the Act allows Illinois collegiate athletes "[to] take control of their destiny when it comes to their name, image, likeness, and voice." The Act will also take "some pressure off of talented kids who are torn between finishing their degree or cashing in on the big leagues." The primary provisions of the Act provide:

1. A student-athlete may earn compensation for using the name, image, likeness, or voice of the student-athlete while enrolled at a postsecondary educational institution. The Act also allows student-athletes to retain agents to negotiate endorsement deals on their behalf.

2. A student-athlete may not receive compensation in exchange for their athletic ability or participation in intercollegiate athletics. They also cannot receive compensation for their agreement to attend a postsecondary educational institution.

3. A student-athlete is not an employee, agent, or independent contractor of an association, conference, or postsecondary educational institution.

The Act provides specific definitions for eleven terms, including "compensation," "image," "likeness," "name," "name, image, and likeness agreement," "social media compensation," and "third party licensee." The following definitions are particularly important:

1. "Student-athlete" is any currently enrolled student who engages in or may be eligible to engage in an intercollegiate athletics program. Therefore, if an individual is declared permanently ineligible in a particular intercollegiate sport, that individual is not a student-athlete for that sport.

1. "Compensation" does not include (a) tuition, room, board, books, fees, and other personal expenses that a postsecondary educational institution provides under the rules of an athletic association or conference to which the postsecondary educational belongs as a member; (b) Federal Pell Grants or other State and federal grants or scholarships; (c) any other financial aid, benefits, or awards; (d) the payment of wages and benefits for work performed not related to a student-athlete's ability or participation in intercollegiate athletics.

2. "Name" is defined to include any nicknames for student-athletes when used in a context that reasonably identifies the student-athlete.

3. "Social media compensation" includes all forms of payment for engagement on social media received by a student-athlete because of the use of that student-athlete's name, image, likeness, or voice.

While the Act may seem straightforward, several caveats and limitations set the outer limits of student-athlete NIL compensation in Illinois. For example, a student-athlete may not earn any compensation in exchange for their athletic ability or participation in intercollegiate athletics. The Act also bars student-athletes from any compensation in exchange for their agreement to attend a specific school. The Act further prohibits a postsecondary educational institution from compensating an athlete instead of requiring third parties to pay any compensation to a student-athlete. Section 15 of the Act prevents postsecondary educational institutions, conferences, and the NCAA/NAIA from enforcing any rules or regulations that would deny athletes NIL compensation. However, the Act carves out that postsecondary educational institutions can impose "reasonable limitations on the dates and time that a student-athlete may participate" in endorsement activities.

These NIL agreements will require attorney representation from three angles: (1) the athlete, (2) the prospective sponsor, and (3) the postsecondary educational institution. From an athlete's perspective, the attorney will negotiate the contract terms, including the "commensurate market value" of the student athlete's NIL. The attorney/agent will also disclose the agreement to the postsecondary institution. Finally, the athlete's attorney must protect the athlete's rights against retaliation by institutions, such as revoking any grant-in-aid or other permissible financial aid, because the athlete retains an agent or attorney.

For the prospective sponsor, the attorney will need to ensure that any NIL contract begins after the student's enrollment in the institution and expires before the athlete's participation in intercollegiate athletics ends. The sponsor's attorneys will also need to ensure that none of the terms of the sponsorship deal conflict with any other school or team contracts. Finally, sponsor's attorneys should note that the Act bars student-athletes from entering any NIL contracts to promote alcohol, smoking, marijuana use, or gambling.

Finally, attorneys for postsecondary institutions have obligations under the Act. The attorneys for the postsecondary institution will need to review all student-athlete NIL contracts to ensure there are no conflicts with any existing contracts. They will also need to ensure that the NIL contracts do not restrict any student-athletes' rights to enter into NIL contracts. Attorneys for the postsecondary institutions will also need to review the NIL contracts to ensure they comport with the institution's "ethical standards." Section 20(i) of the Act prohibits a student-athlete from entering a contract "that negatively impacts or reflects adversely on a postsecondary educational institution or its athletic programs." This prohibition includes sponsorships that "otherwise negatively impacting the reputation or the moral or ethical standards of the postsecondary educational institution." Therefore, the attorneys for the postsecondary institution should include language in any school or athletic team contracts setting out their

"ethical and moral standards" and what would constitute violations thereof. This language would give the postsecondary education institution a basis for challenging an NIL contract and confer standing to litigate a contract if necessary.

A likely point of litigation will be what constitutes "commensurate market value" for NIL compensation. The Act, as written, defines "compensation" very broadly. With all the different forms of acceptable compensation, it could be challenging to evaluate whether the proposed compensation is of "commensurate market value." For example, suppose an athlete and car dealership agree that the athlete will receive a percentage of sales proceeds for a television advertisement. Can the school object that the compensation is not "commensurate market value" when that deal could earn the player more than the university generates revenue from the sport the athlete plays? Also, what about athletes at smaller schools? A well-known basketball player at a high-profile program will demand higher compensation than a Division-II water polo player. How wide a discrepancy will the Illinois courts permit in determining fair value? Will the auto dealership from the earlier hypothetical be justified in paying a percentage of sales to one athlete while perhaps only offering "social media compensation" to the other?

The Act also fails to address royalties. While the Act states that all NIL contracts must terminate when the student-athlete stops participating in intercollegiate athletics, that could be challenging under a contract that provides for royalties for a product that the sponsor continues to sell. For example, suppose a video game company places a picture of a well-known freshman basketball player on the cover of its video game. However, the following year the player makes the jump to the professional ranks. Is the video game company obligated to pull the game from store shelves? Can the company continue to sell the game but not pay the athlete? Must the company re-negotiate the NIL contract now that the player is a professional athlete instead of a student-athlete? Attorneys for the interested parties will need to think ahead and account for these issues in negotiating the terms of any NIL contract that provides for royalties.

Illinois lawmakers hail the Act as a significant step in ushering in a new era of college athletics in the state. However, the Act leaves open enough questions that litigation on compensation and compliance with the Act is inevitable. Athletes, schools, and sponsors will need to work closely with their counsel to ensure compliance with the Act and anticipate potential conflict areas. As more states continue to enact NIL legislation and the NCAA's own rules on NIL go into effect, perhaps some of these issues will be resolved, but perhaps just as likely, conflicting language will lead to even more confusion and litigation.

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Businesses Can Cautiously Proceed with Student-Athlete Sponsorship Deals

By J'Naia L. Boyd, of RivkinRadler

Businesses have been champing at the bit for a chance to collaborate more with college athletes for years. Until recently, however, those collaborations were not possible because college athletes were prohibited from profiting off their name and likeness and entering into sponsorship deals under the rules of the National Collegiate Athletic Association (NCAA).

Over the past couple of years, the NCAA had been considering a change to its name, image, and likeness (NIL) rules as state legislation across the country was taking shape to address NIL-based compensation for student-athletes.[1] Then on June 21, 2021, the United States Supreme Court made a landmark ruling in *Nat'l Collegiate Athletic Ass'n v. Alston,* where it held that the NCAA violated federal antitrust law by imposing rules restricting the education-related benefits that student-athletes may receive, such as post-eligibility scholarships at graduate or vocational schools.[2] Nine days later, the NCAA went a step further and adopted the Interim NIL Policy, allowing college athletes to receive NIL-based compensation.[3] This new policy and

1 *See Taking Action, Name, Image, and Likeness*, NCAA, https://www.ncaa.org/about/taking-action (last visited July 14, 2021); Alan Blinder, *College Athletes May Earn Money From Their Fame, N.C.A.A. Rules*, New York Times (June 30, 2021), https://www.nytimes.com/2021/06/30/sports/ncaabasketball/ncaa-nil-rules.html (last visited July 14, 2021).

2 *See Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141 (2021) (Kavanaugh, J., concurring in result)

3 *See Taking Action, Name, Image, and Likeness*, NCAA, https://www.ncaa.org/about/taking-action (last visited July 14, 2021).