

# Name, Image, Likeness (NIL)

## Checklist for High School and Collegiate Athletes



Brands aim to attach themselves to success, excitement and eyeballs. If an amateur athlete has one or more of these traits, they may be ripe for a brand to pursue them in some type of marketing campaign.

With the relatively recent Supreme Court decision in *Alston v. NCAA* along with a swath of individual state NIL bills, brands may now partner with amateur athletes using the athlete's name, image and likeness.

It is imperative that athletes know and understand the terms and scope of their agreement when contracting with a brand for promotional purposes. Below is an overview of some common material terms of an NIL deal:

### Compensation

There are a few ways athletes are paid in exchange for collaborating with a brand:

#### Pay Per Post

A brand may want to pay for the athlete to post on social media about the brand. Each time the athlete posts, the brand pays a negotiated fee per post. The number of posts, what social media platforms and the fee are subject to negotiation.

#### Flat Fee With a List of Deliverables

A brand may pay a flat dollar amount and expect certain deliverables in exchange, which may include: social media posts, appearances, autographed items, use of athletes NIL in the brand's advertising materials (brand's website, print ads, TV, etc.), participation in a photo/video shoot, and/or creation of user-generated content organically talking about or displaying the brand.

#### Affiliate Relationship

An athlete creates content (usually user-generated content) and posts on social media platforms with a link to the brand's products. If/when consumers click on the link and purchase the brand's products, the athlete receives a percentage of the sale as their compensation. This is the least risky form of NIL for the brand, and conversely the most risky for the athlete because they are not guaranteed any compensation.

### Term

How long is the deal (one month, one year, multiple years)?

#### Can the deal be extended?

- If so, by whom and under what terms?

### Exclusivity

The brand may request that the athlete not endorse/promote its competitors.

- An attorney should negotiate the scope and length of the exclusivity provision on your behalf.

### Ownership

Who owns the content created for the ad, and how can that content be used during and after the term of the NIL agreement is subject to negotiation?

- For example, even if the athlete creates their own user-generated content to promote a product of the brand, can the brand take that content and re-post it, pay for its amplification across social media and other mediums?

### Metrics

A brand may want access to the athlete's social media analytics to determine how effective the campaign was in terms of views, engagement and conversions to sales.

- The scope and access to information is subject to negotiation.

## **Athletes and their advisers also need to consider the following potential red flags before signing any paperwork:**

### **Applicable LAWS and REGULATIONS**

State laws differ, NCAA regulations exist, and each school has its own NIL policies, so check with your school's compliance department before signing any NIL deal so as not to risk your eligibility.

### **Pay for PLAY and RECRUITING INDUCEMENTS**

Although state laws differ, all states currently prohibit any terms that could be viewed as "pay for play," meaning an NIL deal cannot be tied directly or indirectly to the athlete's athletic performance or achievement or school attendance. Many laws also restrict any forms of recruiting inducements that would require attending a particular school in order to earn any NIL payments.

### **Third-Party Branding**

Including a school name/logo or other third-party brand's name and/or logo in any advertising content used must be approved in writing. It is generally best not to include any third-party logo or names in any advertising copy.

### **Tell the Truth**

Don't exaggerate about the product or service. For example, don't say the product is great, if you do not actually use the product and think it works great.

### **Federal Trade Commission (FTC) Compliance**

Influencers are required to let the public know they are being compensated for the endorsement of the product.

### **Federal Trade Commission (FTC) Compliance**

Influencers are required to let the public know they are being compensated for the endorsement of the product.

### **Future Considerations**

Some deals may attempt to attach obligations past the initial term of the agreement. These obligations may be costly, detrimental to the athlete, and could interfere with NCAA eligibility requirements.

## **It is important that an attorney reviews any deal before it gets signed.**

If you have any questions about the terms of an NIL deal, please contact:



**D. Erik Albright**  
ealbright@foxrothschild.com  
336.378.5368



**Cameron Baker**  
cbaker@foxrothschild.com  
561.804.4439



**David A. Gehn**  
dgehn@foxrothschild.com  
212.878.7910



**Leron E. Rogers**  
lrogers@foxrothschild.com  
404.876.4567