



HUSCH BLACKWELL

# The New Frontier of College Athlete Name, Image and Likeness

Practical Considerations for Colleges and Universities

1



## Presenters



**Jason J. Montgomery**

816-983-8291

[Jason.Montgomery@huschblackwell.com](mailto:Jason.Montgomery@huschblackwell.com)



**Demetrius J Peterson**

816-983-8181

[Demetrius.Peterson@huschblackwell.com](mailto:Demetrius.Peterson@huschblackwell.com)



**Aleks O. Rushing**

314-345-6275

[Aleks.Rushing@huschblackwell.com](mailto:Aleks.Rushing@huschblackwell.com)

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

2



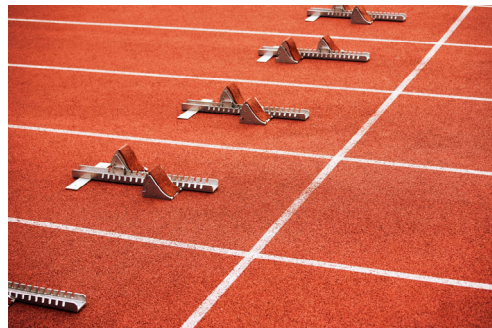
## Education Team

HUSCH BLACKWELL

3

## Agenda

- Background
- State laws, NAIA rule and NCAA rules
- Federal Legislation
- First Amendment
- Title IX



HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

4

## Background

- O'Bannon v. NCAA (2015)
- Right of publicity
- New platforms that allow individuals to monetize social media presence
- Concept of amateurism in college sports
- College athlete rights movement



HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

5

## Background

### California Law "Fair Pay to Play Act"

Passed 9/30/19, Effective 1/1/23

### Florida Law

Signed in law 6/12/20; Effective 7/1/21

### NAIA Rules

Deregulated rules related to NIL October 2020

### NCAA Rules

Tabled proposed NIL rules schedule for January 2021 adoption (SCOTUS, DOJ)

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

6

## NAIA Deregulation

Acts permitted by NAIA amateur code:

Receiving compensation for use of name, image or likeness to promote any commercial product or enterprise, or public or media appearance. It is the responsibility of the student-athlete to notify their institution's athletics director in writing of any compensation student receives from the use of their name, image or likeness in relation to their school or status as a student-athlete.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

7

## States Weigh in

- Bipartisan issue
- 22 bills passed; 14 bills introduced
- Oklahoma and Nebraska - In effect now at discretion of individual institutions, all schools must apply by July 1, 2023
- 9+ states effective date of July 1, 2021: Alabama, Connecticut, Florida, Georgia, Kentucky\* Mississippi, New Mexico, Ohio\* and Texas (Illinois, Oregon); Arizona effective July 23, 2021

\*Executive Order

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

8

## States Weigh in

### Commonalities

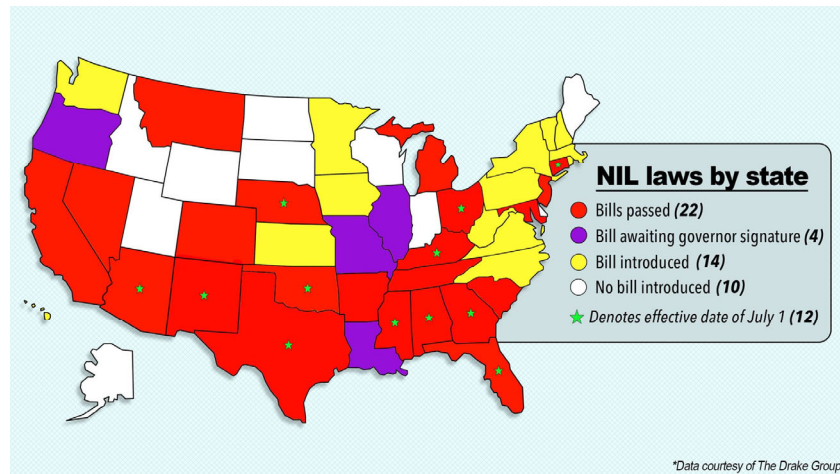
Disclosure

No conflicts with institutional contracts

Specific to student-athletes and not prospects

Protection of scholarship and eligibility

Agent or other professional representation permissible



HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

9

H-B

## States Weigh in



### Differences

- Financial literacy programs for student-athletes (AL, FL, GA, NV, TN, TX), LA and MO pending
- Prohibition against NIL contracts with certain industries
- Intellectual property
- NM cannot prohibit or discourage a student-athlete from wearing footwear of the student-athlete's choice during team activities

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

10

## NCAA v. Alston SCOTUS Decision

June 21, 2021 – Upheld certain NCAA rules violated Section 1 of the Sherman Antitrust Act

- Limited issue related to NCAA rules limiting education-related benefits but with significant implications
- NCAA can no longer rely on NCAA v. Board of Regents of the University of Oklahoma (1984) dicta to support antitrust protection
- Justice Kavanaugh concurring opinion suggests ALL NCAA compensation rules (e.g., scholarship limits) “raise serious questions under antitrust laws”

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

11

## NCAA Rules

Interim NCAA policy announce June 28th to be adopted June 30<sup>th</sup> by the NCAA Division I Board of Directors:

- College athletes can engage in NIL consistent with law of the state where the school is located
- If attend school without state law, can college athlete can engage in NIL activity without violating NCAA rules
- College athletes can use professional service provider for NIL
- Must report NIL consistent with state law or school or conference requirement
- Schools and conferences may choose to adopt their own policies

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

12

## Key Considerations

- State law(s) first
- Institutional Policies and Procedures
  - Disclosure
  - Conflicts with contracts/sponsorships
  - Use of Intellectual Property (Names and Marks)
  - Mandatory athletics activities
  - Voluntary/Promotional athletics activities

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

13

## Key Considerations

- Institutional Policies and Procedures
  - Values based prohibitions
  - Use of NIL for institutional purposes (release?)
  - Team/athletic department rules
  - Recruiting/booster prohibition
  - Employment Status (not employees of institution)
  - International athletes
- Other Issues: Tax, Federal Aid, First Amendment, Title IX

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

14

## Federal Name, Image, and Likeness Legislation



HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

15

## Collegiate Athlete and Compensatory Rights Act

- AKA “CACRA” or “the Wicker Bill”
- What is it? A nationwide framework governing student athlete name, image, and likeness compensation that will permit college athletes to earn compensation through commercial endorsement deals with certain restrictions.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

16



## The Wicker Bill

---

- Introduced: December 17, 2020.
  - Read twice and referred to the Committee on the Judiciary
- Sponsors: Sen. Roger Wicker [R-MS], chair of the Senate Commerce Committee
- Currently in Senate

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

17

## The Wicker Bill cont.

---

- Imposes contractual restrictions on athletes and third-parties:
  - Athletes prohibited from making endorsement deals with several companies, including those associated with alcohol, tobacco, gambling or drugs
  - Athletes prohibited from entering into agreements that conflict with institutional agreements, unless expressly waived
  - 3<sup>rd</sup> parties prohibited from entering into, or offering, NIL agreements to a student athlete prior to academic enrollment
  - Athletes will have educational resources regarding earning compensation for the use of the NIL

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

18

## The Wicker Bill cont.

- Athletes will maintain amateur status
  - Schools cannot classify student-athletes as “employees”
  - Boosters cannot directly or indirectly pay athletes nor their families for the use of their NIL
- Federal Trade Commission (FTC)
  - Will select a private, independent, and nonprofit entity to be responsible for developing and administering NIL rules for student-athletes, institutions, associations, certified sports agents, and others involved

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

19

## College Athlete Bill of Rights

- AKA “CABR” or “the Booker/Blumenthal Bill”
- What is it? A comprehensive bill that grants student-athletes NIL rights and additional healthcare coverage and educational benefits.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

20

## The Booker Bill cont.

---

- Introduced: December 10, 2020
  - Read twice and referred to the Committee on Commerce, Science, and Transportation
- Sponsors: Sen. Booker, Cory A. [D-NJ]
  - Sen. Blumenthal [D-CT] , Sen. Gillibrand [D-NY], Sen. Schatz [D-HI]
- Currently in Senate

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

21

## The Booker Bill cont.

---

- Major components
  - Provides no anti-trust protection for the NCAA
  - Schools must share revenue with athletes
  - Athletes receive scholarship support for as long as it takes to earn their undergraduate degree
  - Unlimited transfers for athletes without consequence

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

22

## Key Differences

Collegiate Athlete and Compensatory Rights Act	College Athlete Bill of Rights
Less expansive; narrow focus on NIL rights and NCAA protections.	Broad and more comprehensive; provides additional benefits for athletes including healthcare coverage and educational benefits.
FTC to select a private, independent, and nonprofit entity to be responsible for developing and administering NIL rules for student athletes, institutions, associations, certified sports agents, and others operating within the college sports ecosystem	Establish the Commission on College Athletics: Nine members including no fewer than 5 former college athletes and individuals with expertise ranging from publicity law to Title IX  Each school will be required to provide annual public reporting.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

23

## Health and Safety

- Booker Bill
  - Creates a medical trust fund for athletes
    - Reimburse athletes for out-of-pocket health expenses
  - HHS and CDC will develop enforceable “evidence based” health standards specific to college athletics
    - Address traumatic brain injury and sexual assault
- Wicker Bill
  - Creates a committee to examine health and safety issues

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

24

## Mahanoy's Impact on Collegiate Athletics



HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

25

## *Mahanoy Area School District v. B.L.*

- Involved a high school cheerleader who posted her frustrations with her school's cheer team on Snapchat
- U.S. Supreme Court affirmed the 3<sup>rd</sup> Circuit's decision on June 23, 2021
- Public schools may have a special interest in regulating *some* off-campus student speech
- However, the special interests offered by the school are not sufficient to overcome a student's interest in free expression

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

26

***Mahanoy Area School District v. B.L.***

**What Happened?**

A high school student did not make the varsity cheerleading team. The student posted two images on Snapchat, expressing her frustration with the school and the school's cheerleading squad and one contained vulgar language and gestures. When school officials learned of the posts, they suspended the student from the cheerleading squad for the upcoming year after deciding the post violated team and school rules. School administration refused to reverse that punishment.

Student and parents sought relief in the district court, arguing inter alia that punishing student for her speech violated the First Amendment.

**U.S. District Court, Middle District of P.A.**

**Punishment violated the First Amendment because the Snapchat posts had not caused substantial disruption at the school.**

Court ordered the school to reinstate the student to the cheerleading team.

**HUSCH BLACKWELL**

© 2021 Husch Blackwell LLP

27

**H-B**

**Third Circuit**

Third Circuit applied the geographical test to determine whether the punishment violated the First Amendment.

**Geographical Test:**  
Schools cannot interfere with the free speech rights of off-campus students.

**Holding: The punishment violated the First Amendment.**

Because the snapchat posts at issue were made off-campus, the school had no special license to regulate student speech occurring off campus.

**HUSCH BLACKWELL**

© 2021 Husch Blackwell LLP

28

## The U.S. Supreme Court



### The Relevant Inquiry

Students' interest in their First Amendment right to free speech

vs.

Schools' interest in regulating off-campus student speech

Whether a school can regulate off-campus student speech is a question of circumstance—not location.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

## When *can* a school regulate student off-campus speech?

- Serious or severe bullying or harassment targeting particular individuals.
- Threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities.
- Breaches of school security devices.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

## The Impact on Collegiate Athletics

- Schools will have little control over off-campus social media speech of coaches and student athletes.
- Coaches will have little control over off-campus social media speech of coaches and student athletes.

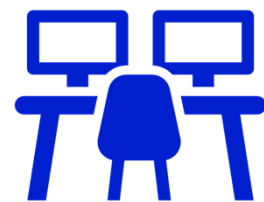
HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

31

## Title IX & Intersection with NIL

- Background on Title IX and Gender Equity and Athletics
- Compliance Concerns at Intersection of Title IX and Name, Image, and Likeness
- Potential OCR Enforcement and Litigation



HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

32



## Background on Title IX and Gender Equity and Athletics

---

- “No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.”

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

33

## Background on Title IX and Gender Equity and Athletics cont'd

---

- Equitable Participation
- Equitable Financial Support
- Equitable Treatment



HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

34



## Background on Title IX and Gender Equity and Athletics

---

1. Equitable Participation
  - A. “Substantially proportionate” opportunities; or
  - B. “History and continuing practice of program expansion;” or
  - C. “Fully and effectively” accommodating the interests and abilities of the underrepresented gender
2. Equitable Financial Support
  - “Substantially proportionate”
3. Equitable Treatment
  - “Laundry list”

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

35



## Compliance Concerns at Intersection of Title IX and NIL

---

- Recruiting
- Publicity/Marketing
- Approval process with institution for student-athletes to work with third-parties

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

36

## Compliance Concerns at Intersection of Title IX and NIL cont'd

---

- Recruiting
  - Training Coaches
  - Consistency
  - Double Check



HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

37

## Compliance Concerns at Intersection of Title IX and NIL cont'd

---

- Publicity/Marketing
  - Equitable treatment
  - Assess opportunities provided between sports that may impact NIL



HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

38

## Compliance Concerns at Intersection of Title IX and NIL cont'd

- Approval process with institution for student-athletes to work with third-parties
  - *Consistency in policy, procedure, practice, and implementation*
- Temple University Study



HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

39

## Potential OCR Enforcement and Litigation

- U.S. Department of Education's Office for Civil Rights
- Litigation
- Media Scrutiny/Negative Publicity



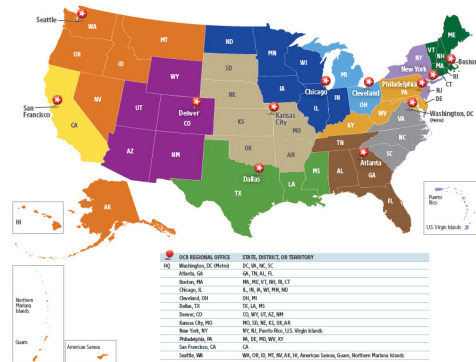
HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

40

## Potential OCR Enforcement and Litigation Cont'd

- Responsible for resolving complaints from students alleging that schools who receive federal assistance violated their civil rights.
- Discrimination complaints regarding:
  - Race
  - Color
  - National origin
  - **Sex**
  - Disability
  - Age
- May get guidance on NIL?



HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

41

## Potential OCR Enforcement and Litigation Cont'd

- Uncharted territory in Title IX litigation
  - Monetary damages can be awarded in Title IX cases



HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

42



## Title IX & Intersection with NIL Takeaways

- Consistency, consistency, consistency
- Be aware of compliance concerns
- Continue to track, monitor, and reevaluate
- Consider audits, surveys, and other assessments



HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

43



HUSCH BLACKWELL

**VISIT:**  
**[Huschblackwell.com/thought-leadership  
newsandinsights.com](https://huschblackwell.com/thought-leadership/newsandinsights.com)**

**Subscribe to College Athletics, Higher Education and  
Title IX Mailing Lists for Legal Alerts, Webinar  
Invitations and White Papers**

44

# Thank You

—

© 2021 Husch Blackwell LLP