

Group Licensing NIL Deals and the Transfer Portal

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The state of college sports has been in a frenzy as of late due to ongoing legal challenges and changes to NCAA legislation on NIL. Concerns regarding the regulation of NIL have only been exacerbated by the changes to the student-athlete transfer portal, which has in some instances, devolved into a glorified recruitment tool for athletic programs to lure student-athletes away from their current institution. Given the current landscape of college sports, the lack of regulation in the area of Group Licensing NIL deals (“GL-NIL”) creates a vacuum for known and unknown consequences that stem from the decision of one or more student-athletes to transfer away from their institution after their institution has executed a GL-NIL deal.

HOW DID WE GET HERE?

In April of 2021, the NCAA’s “one-time transfer exception” took effect, allowing Division I student-athletes to transfer to a new institution and play immediately without the need to sit out one year (and lose one year of eligibility). The concerns brought about by the transfer portal were compounded in July of 2021, when the NCAA instituted the NIL interim rule on the heels of the Alston decision. Now more than ever, student-athletes are considering the extent to which a transfer to a new institution will boost their ability to sign lucrative NIL deals. A prime example is the transfer of star quarterback, Caleb Williams, who signed a new NIL deal with “Beats By Dre” shortly after transferring to USC from the University of Oklahoma. Williams had no previous NIL deal, so new school, new deal. Pretty cut and dry. But what if, instead, Williams had entered the transfer portal shortly after headlining a new GL-NIL deal with his previous institution? The

consequences of such a scenario remain incredibly unclear under the current rules and guidance.

HOW DO GL-NIL DEALS COME INTO PLAY?

While the GL-NIL deal is fairly new to the college sports scene, it has long been a major conduit for business engagements in the entertainment and professional sports industries (e.g. NBA 2K video game, MLB trading cards and the manufacture and sale of WNBA jerseys). Currently in college sports, GL-NIL deals are gaining momentum. From sponsorship deals for specific teams to conference-wide opportunities, GL-NIL deals come in all shapes and sizes.

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Notably, in the course of developing NIL guidance, the NCAA has remained silent on the potential use and regulation of GL-NIL deals. Likewise, the NCAA stopped short of applying additional permissions or restrictions on the transfer portal. In the absence of such authority and guidance, (including the anticipation of federal congressional authority), all interested parties are left in a contractual “gray area” to the extent that states, athletic conferences and institutions do

not provide rules or guidance on handling issues that may arise through the intersection of a GL-NIL deal and the transfer portal.

It follows that in the context of executing GL-NIL deals today utilizing the collective leverage of multiple athletes (that may include the use of intuitional marks and/or logos), the current legislative landscape presents a set of unique problems in the event that one or more student-athletes decide to exercise their rights under the transfer portal. Those problems include but are not limited to:

- What happens to a team-wide GL-NIL deal when the star player(s) for that team transfers mid-contract to another institution? Does the departure of the student-athletes with the biggest draw decrease the overall value of the deal/ put the deal in jeopardy?
- Can a third-party brand terminate a GL-NIL if one or more star student-athletes transfer to a different institution?
- Can GL-NIL agreements continue to use the NIL of student-athletes who no longer attend the institution?
- Can student-athletes who enter the transfer portal continue to receive payment if their NIL is still being monetized as part of the GL-NIL deal?
- How can GL-NIL deals in colleges sports incentivize student-athletes to remain at their current institutions while not running afoul of NCAA bylaws?

Most, if not all of the questions above could (and should) be addressed through federal coordinated legislation that brings the NCAA, student-athletes and institutions to the table. However, in the interim, all parties looking to engage in GL-NIL deals will do so without a clear understanding of how GL-NIL deals or the transfer portal will be regulated in the future.

WHAT CAN BE DONE NOW?

Currently, marketing, branding and licensing companies are executing GL-NIL deals at institutions across the country. In March, Syracuse executed a GL-NIL deal with Brandr using the institution’s official trademarks and logos. In June, LSU also signed onto a similar GL-NIL deal with Brandr, but included a caveat that student-athletes cannot use the institution’s marks or logos unless it’s through a GL-NIL deal.

However, given the gray area surrounding both GL-NIL and the transfer portal, if a student-athlete transferring (while a GL-NIL deal is still in progress) significantly undermines the value of a GL-NIL deal, institutions and third parties are limited to remedies stemming from breach of contractual obligations.

Prior to negotiating the next GL-NIL deal, interested parties should consider the following contractual provision considerations:

- Structure contracts such that student-athletes are compensated purely for their performance in the GL-NIL and not conditioned on continued enrollment at a specific institution.
- Be specific regarding what conduct

meets the threshold for substantial performance for all involved parties as well as conduct that amounts to a breach.

- Memorialize the process by which individual student-athletes can be added and/or removed from the class of individuals participating in the GL-NIL deal.
- Create tiers of student-athlete participation in GL-NIL deals such that former student-athletes can maintain passive participation in an ongoing GL-NIL deal to the extent feasible.
- Set an institutional “cooling off” period where a student-athlete is prohibited from entering into a GL-NIL deal that is in direct competition with a current or recent deal that expired for a least six months.

Paying special attention to these contractual provisions will aide in mitigating the potential impact of student-athletes’ premature departure from an institution while a GL-NIL is active and ongoing. Notwithstanding, institutions should keep in close contact with legal counsel regarding new developments in the regulation of GL-NIL deals and the transfer portal.



About the Authors



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