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## After Chaotic 2021, NCAA Faces Reckoning On Athlete Rights

By Zachary Zagger

*Law360 (January 3, 2022, 12:02 PM EST)* -- Gatorade gave University of Connecticut basketball star Paige Bueckers a multiyear endorsement deal in November, making her the first college athlete signed by the popular sports drink maker known for having a roster of high-profile pro endorsers.

The deal could bring Bueckers, who became the first freshman to win the John Wooden Award as the nation's best collegiate female player last season, as much as \$1 million when combined with another sponsorship deal with StockX, an online marketplace for sneakers, according to a Wall Street Journal report.

Just a year ago, such deals would not have been possible. But in a momentous change, the National Collegiate Athletic Association in July waived its restriction, at least on an interim basis, on athletes' being able to be paid for use of their names, images and likenesses, or NIL.

To say the past year for college sports and the NCAA has been transformational might be an understatement. The U.S. Supreme Court shot down the NCAA's defense of amateurism, opening the door for athletes to receive a host of additional education-related benefits, and the NCAA bowed to pressure to open up NIL rights as several states passed laws to allow it regardless.

The developments have resulted in a new playing field for college athletes, who can now earn some pay and benefits under a still-evolving system that many say is for the better.

"It is a fundamental change," said sports attorney Glen Rothstein of Rothstein Law APC. "It went from 'you can't get paid' to 'now you can.' ... It is a little bit of the Wild West."

The NCAA still prohibits so-called pay for play, or schools directly paying athletes, but the organization's grasp over college sports is slipping as schools begin to embrace NIL and a new set of legal challenges over athlete unionization and employment status comes down the pike.

Here's a look at the key issues that could usher in further change in 2022.

### Growing College Athlete NIL Market

On July 1, the NCAA **opened the door** for the more than 460,000 college athletes at more than 1,100 colleges across the country to license their NIL for commercial purposes, significantly for sponsorships and endorsements, without losing their NCAA eligibility.

The move came as at least seven state laws allowing college athletes to monetize their NIL were set to take effect. More than a dozen other state laws are set to follow in the coming years.

"I think it came as a bit of a surprise and created a bit of a scramble. Some brands were prepared and really wanted to be the first or one of the first to do a deal, but now I think it is starting to settle down a bit," said Matthew Reece, a sports, entertainment and advertising attorney with Manatt Phelps & Phillips LLP's digital and technology practice.

"I am seeing some major brands who are starting to do NIL deals with college athletes on kind of a strategic campaign basis," Reece said. "I think you are going to see the market continue to evolve."

Less than a year into the new regime, athletes are beginning to cash in, and some, like Bueckers, for big bucks. Her deal is also significant, experts said, because it shows how female athletes can help expand the profile of women's sports and increase their economic benefits. The NCAA has been hammered for not investing in women's sports in the same way it does men's sports.

Opendorse, a sports technology company that helps facilitate college athlete endorsements, found that the average compensation for Division I athletes under the new rules was \$471, according to a Yahoo News report in July. Opendorse has also projected that the college athlete NIL market could reach \$1.5 billion in 2021 alone.

Behind the explosion of NIL deals is a patchwork of rules among various states and the policies of individual schools that could create challenges for the burgeoning market in the coming year.

The NCAA has pushed for a federal bill to create a consistent policy nationwide, but the proposal has been mired in political disagreement in Congress and seems unlikely to pass, at least in the near term. Schools and conferences are setting their own policies, while some are taking an active role in educating their athletes on signing sponsorship and endorsement deals.

In each of the 28 states with NIL laws on the books, schools have authority over the compliance and enforcement of the deals, according to a survey of laws compiled by Reece and his firm. Ten state NIL laws prohibit endorsing or promoting companies in specific categories, including alcohol, tobacco, pornography and sports betting and gambling, according to the survey. Four states expressly give the individual schools discretion over prohibited categories.

Reece told Law360 he thinks that a review of the market will be needed after some time to see exactly what kind of deals are being struck and whether there are real differences in those deals.

"It will be very interesting after this school year to take a look back and see what the deals already were," he said, to "match up the actual deal activity to the policies and see if there is a difference between similarly situated schools in a state with a name, image and likeness law and another that is in a state without a law."

Further, questions remain about whether some NIL agreements, especially those facilitated by schools, could violate existing NCAA policy against using deals as recruiting tools or inducements, and whether students at high school age and younger should be able to participate. NCAA President Mark Emmert told Congress in September there is concern that some NIL deals being reached steer close to being prohibited "pay for play."

"It is an exciting time," Reece said. "There is still a lot to be figured out. What we haven't seen yet are any fingers pointed in terms of any violations of rules that have threatened eligibility. I think that the litigating piece [enforcement], just as much as writing legislation, is the way in which the regulatory system is going to evolve."

### **Redefining Amateurism and the Role of the NCAA**

The NCAA itself is in the midst of structural changes following its loss in the U.S. Supreme Court's June decision in *NCAA v. Alston*, which rejected the NCAA's position that it should have freedom to enforce its system of amateurism without questioning by the federal courts.

In a concurring opinion, Justice Brett Kavanaugh told the NCAA "it is not above the law," sending a clear message that the organization must make changes to allow athletes to profit from or share in the revenues of college sports, or face the potential of more lawsuits.

At the end of 2021, the NCAA embarked on a special "constitutional convention" that will produce a new constitution to be voted on this month.

Early drafts of the new constitution would shift away from the granular regulation of college sports at the NCAA level. Instead, it would establish overarching principles for the NCAA's three divisions — Division I, or D-I, being composed of the 351 schools at the highest level of competition, highlighted by the annual NCAA March Madness college basketball tournament — and in some cases college conferences to establish their own rules and regulations.

The drafts also move away from an elaborate definition of "amateurism," recognizing athletes' continued right to commercialize their NIL and instead boiling it down to a policy against "pay for play."

"They had to do that just because now all the athletes are allowed to be paid for their name, image and likeness and now potentially are employees," said corporate and sports attorney Jack Concannon of Morgan Lewis & Bockius LLP. "The historical definition of amateurism is gone now, at least as it relates to college sports."

The move also appears to be a more deliberate effort at reform for an organization that has been criticized as being slow to act, particularly on the NIL front, where the NCAA waived rules only after state legislatures had forced its hand.

The NCAA has lobbied Congress to pass a nationwide standard for NIL, but that has seemingly only opened the door for lawmakers to consider broader legislation, including some proposals to create a government commission to oversee college sports or to grant college athletes the right to unionize.

The NCAA has been "declining to weigh in on some of the biggest issues affecting college sports, such as sports betting and NIL, and is instead deferring to the states and the schools themselves," said sports attorney Baird Fogel of Morgan Lewis. "It is really hard to determine exactly where this is going to land in the absence of federal legislation, but for sure the role of the NCAA and the definition of amateurism is forever changed."

### **Athletes as Employees and the Push for Unionization**

The NCAA is already facing a new round of legal fights over whether college athletes are employees, with a proposed class action in Pennsylvania seeking to represent more than 200,000 college athletes.

The athletes in *Johnson v. NCAA* have asked a federal judge for conditional certification of a class of all athletes who played for NCAA Division I schools since April, after the judge in August rejected a bid by the specific schools named to dismiss the case.

Similar lawsuits in the past have not been successful, but the NCAA rule changes, the Alston case and state NIL laws have seemingly altered the dynamic.

In September, National Labor Relations Board general counsel Jennifer Abruzzo added fuel to the fire, saying in a formal memorandum to the boards' regional offices that athletes at private universities should be considered employees under federal labor law, perhaps clearing the way for them to unionize.

The new interpretation came after the NLRB punted on a unionization effort by Northwestern University football players in 2015, declining to assert jurisdiction because it "would not serve to promote stability in labor relations."

The memo would specifically apply to private universities, which are more clearly under the NLRB's jurisdiction, but experts say that if conferences or the NCAA are considered joint employers of the athletes, that could pull public universities, which are governed by state labor law, into the board's purview.

Concannon said it is likely that unions will start a hard push to organize college athletes, particularly in the so-called Power Five conferences, the most lucrative conferences composed of most of the elite college football programs.

"They are going to try to sell unionization to these athletes/employees, and that is going to happen soon," he said.

While the Johnson case, the NLRB memo and the Alston case all focus on different areas of law, experts say all raise the fundamental question of whether athletes should be treated more like employees, a change that would strip away the NCAA's prohibition on "pay for play."

The athletes in the Johnson case have already pointed to Abruzzo's memorandum, along with the Alston case, as evidence why the schools should not be able to appeal to dismiss the case.

"There are downsides and upsides to both," Fogel said of classifying college athletes as employees. "The athletes get a seat at the table, but they lose some of their power as individuals. The universities are obviously going to face higher costs potentially and less discretion with their programs."

"But maybe this somehow increases morale among athletes and helps in the recruiting and the retention of athletes," he said. "I am not sure I agree, but we are just seeing the beginning of this."

--Editing by Robert Rudinger and Dave Trumbore.