

Who Is NIL Leaving Out? Challenges and Solutions for International Student-Athletes

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The National Collegiate Athletic Association (NCAA) adopted name, image, and likeness (NIL) legislation in July 2021. The expectation was for all NCAA student-athletes to have the opportunity to seek compensation for their NIL, but the reality is quite different. International student-athletes are not easily able to benefit from their NIL due to restrictions placed on off-campus work under the terms of their entrance visas to the United States. This paper explores the need for the NCAA, NCAA member institutions, and government agencies to re-evaluate policies in an effort to ensure all student-athletes have the right to profit off their NIL. It is crucial that the membership is aware of how international student-athletes are confined by student visa regulations. In order to create a fair and equitable experience for all student-athletes, the NCAA and athletic departments need to understand off-campus work regulations and exceptions for international student visas (F-1 visa). Additionally, there is a need to advocate for this specific sub-population of student-athletes. We explore the idea of creating the opportunity for NIL to be considered on-campus work for international student-athletes, or perhaps even assisting this population in filing exceptions within the constructs of the law. With domestic student-athletes already benefiting from NIL, it is time to find ways to allow international student-athletes to do the same. In essence, such opportunities would create one less barrier for international student-athletes who already face difficulty adjusting to life in the US.

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Introduction

Over the past 30 years, the internationalization of higher education has grown significantly (De Witt, 2019). Many of the ties between international students are with research universities. For countries with emerging economies, there is a need for younger generations to study abroad in order to develop the necessary skills to effectively influence the infrastructure in their home countries (De Witt, 2019). From 1980 to 2017, the number of international students attending institutions of higher learning in the United States (US) has increased from 2.5% to 5.1% (Bound et al., 2021). With nearly a million international students studying at colleges and universities across the US, the US serves as a premier destination for the international student population (Institute of International Education [IIE], 2021).

Athletics intertwined within the educational setting is uniquely American (Ridpath et al., 2019). As such, “There are over 20,000 international student-athletes enrolled and competing at NCAA schools” (National Collegiate Athletic Association; NCAA, 2022, para. 1). Research (Hirko, 2009; Newel, 2015; Popp et al., 2011; Stokowski et al., 2014; Turick et al., 2020) has repeatedly demonstrated the important role international student-athletes play on their team as well as the distinctive experiences this population brings to their respective campus. Frankly, international student-athletes promote diversity, cultural competence, and reduces stigma (Hirko, 2009).

International student-athletes come to the US for a variety of reasons. Altbach (2004) found that international student-athletes travel to the US due to the notable reputations of American colleges and universities as well as the potential to gain employment post-graduation. Additionally, college coaches favor international student-athletes in the recruiting process due to their academic ability, competitive playing experience, as well as their superior work ethic (Ridinger & Pastore, 2000; Popp et al., 2009).

Although international student-athletes’ motivations for studying in the US vary (e.g., Altbach, 2004; Popp et al., 2009; Stokowski et al., 2013, the struggles of this population have been well documented. International student-athletes often face difficulties (e.g., feelings of isolation, homesickness) adjusting to life in a foreign land (Gold, 2016; Ma, 2020; Mukminin, 2019; Newell, 2015; Rajapaksa & Dundes, 2003; Ridinger & Pastore, 2000; Tang et al., 2018; Telbis et al., 2014; Xing & Bolden, 2019). Additionally, international student-athletes have different needs than their domestic counterparts (Trendafilova et al., 2010). Such differences require the need for an effective support structure grounded in understanding this special student population (Luo et al., 2019; Newell, 2015; Ra & Trusty, 2017; Sullivan & Kashubeck-West, 2015).

The amateurism ideal has also presented problems for international student-athletes, as “rules founded in localized amateurism ideals are now being applied on a global scale, in countries where there is no similar concept of amateur athletics” (Abbey-Pinegar, 2010, p. 341). The European club-based model, for example, often consists of sponsors, fees, and government subsidies. Many club team rosters also employ professional athletes. Therefore, international students who wish to compete at NCAA member institutions may be violating the principles of amateurism by simply competing within the sport context in their countries of origin (Abbey-Pinegar, 2010). Additional obstacles being placed on the international student-athletes population involve visa restrictions.

Most international college students come to the US on a F-1 student visa. According to US Citizenship and Immigration Services (USCIS, n.d.):

The F-1 Visa (Academic Student) allows you to enter the United States as a full-time student at an accredited college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in a language training program. You must be enrolled in a program or course of study that culminates in a degree, diploma, or certificate and your school must be authorized by the U.S. government to accept international students. (para. 2).

Following the passage of various state laws aimed at pushing NCAA institutions towards allowing student-athletes the opportunity to profit off of their names, images, and likenesses (NIL), the NCAA began to move towards allow student-athletes “the opportunity to benefit from the use of their [NIL] in a manner consistent with the collegiate model” (NCAA, 2019, para. 1). These efforts culminated on June 30, 2021, with the NCAA’s passage of interim rules allowing student-athletes the broad use of their NIL rights as regulated by states and individual institutions (Brutlag Hosick, 2021; see also Ehrlich & Ternes, 2021).

Due to the nature of the F-1 visa, however, international students are generally prohibited from obtaining employment outside of the educational setting. Therefore, despite the NCAA’s broad allowance of NIL rights, international student-athletes are in essence still prohibited from profiting from their NIL due to visa restrictions. There is an irony in such a sentiment, as for decades student-athletes were denied the right to profit from their NIL (Belo, 1996). Yet, for 20,000 international student-athletes (NCAA, 2022), the right to profit from their NIL continues to be denied. Given such circumstances, this paper seeks to explore the challenges international student-athletes face in regard to profiting from their NIL, as well as recommendations for legislation what will serve this specific sub-population of student-athletes ensuring fair and equitable opportunities.

NIL and International Student-Athletes

In a media release announcing the NCAA's tentative NIL policy, NCAA President Mark Emmert stated: "This is an important day for college athletes since they are all now able to take advantage of name image and likeness opportunities" (Brutlag Hosick, 2021, para. 2). The current policy is dictated state by state, meaning there is no federal legislation surrounding student-athletes profiting from their NIL. While Emmert noted all student-athletes can benefit financially from NIL policy, such a statement is indeed not legally correct. International student-athletes are unable to engage in NIL opportunities.

International student-athletes generally are allowed into the United States to study and participate in intercollegiate athletics under the terms of an "F-1" or student visa. Created in 1961 through the Mutual Educational and Cultural Exchange Act, F-1 visas were designed to allow international students to study at US educational institutions, adding to the diversity educational experience in the US (Stewart, 2013). Unfortunately, shifting political agendas have resulted in tightened immigration policies. In modern times, strict restrictions have been placed on F-1 visas, including increased oversight of employment options. International students on F-1 visas are only allowed to work on campus and only in a position that does not displace an American student or employees (Stewart, 2013). More specifically, international students on F-1 visas are only allowed to work after one year, and are only allowed to work in one of three distinct roles: in Curricular Practical Training (CPT), Optional Practical Training (OPT), or Science, Technology, Engineering, and Mathematics (STEM) Optional Practical Training Extension. Each are specifically designed forms of practical training, which must relate to the student's major and/or program of study and usually take the form of an internship, practicum, or cooperative educational program (USCIS, n.d.; University of Washington, 2020; Weber, 2022).

Beyond those narrowly defined opportunities, F-1 students may be able to work off campus due to a severe economic hardship, with each case individually reviewed by the USCIS (n.d.). According to the USCIS (2019), for international students to apply to work on their F-1 visa they must have experienced the following:

Loss of financial aid or on-campus employment (through no fault of your own); Substantial fluctuations in currency value or exchange rate; Inordinate increases in tuition or living costs; Unexpected changes in the financial condition of your source of support; Medical bills; and Other substantial and unexpected expenses. (para. 5).

Based on the requirements for working off campus with a F-1 visa, international student-athletes are not eligible to make money from NIL, making Emmert

incorrect in saying *all* student-athletes are able to profit from their NIL.

NCAA compliance officials are not the only individuals monitoring international students' visas. Immigration and Customs Enforcement (ICE) requires international students to attend a school that is a part of the Student and Exchange Visitor Program (SEVP), and to register through the Student and Exchange Visitor Information System (SEVIS). SEVIS is monitored by the US Department of Homeland Security and the Department of State. When reviewing ICE requirements in SEVIS, there is a warning sign at the top of the webpage: "If you are aware of student visa fraud or nonimmigrant students working unlawfully in the U.S., report it here: [email] or Call 1-866-DHS-2-ICE" (ICE, 2022, para. 3). As the academic institution sponsors the student receiving the F-1 visa, schools are required to update SEVIS at the beginning of each semester.

Institutional Policies

Although NIL allows student-athletes to receive compensation, such legislation does not override institutional policies or state laws. Therefore, student-athletes at different institutions, in different conferences, and states need to be aware of different requirements and regulations. For example, in Pennsylvania, student-athletes required to disclose proposed NIL contracts to a designated official of the institution at least seven days prior to execution of the contract (Schnader, 2021). Even though the NCAA adopting NIL is positive, there are still several challenges that all student-athletes face, and there is a lack of guidance from the NCAA.

The literature notes the importance of social and institutional support to assist international student-athletes acclimate campus life in the US (e.g., Newell, 2015; Navarro et al., 2020). Accordingly, there is a need to educate international student-athletes about the rules of employment regarding their visa and NIL activities (Grambeau, 2020). The University of Florida (n.d.) has included frequently asked questions about NIL and international student-athletes on their International Center website, yet a designated school official is still required to be a part of the process. Therefore, international student-athletes must also navigate institutional policies and procedures when considering investing in their NIL.

While the process for engaging in NIL opportunities in the US is nearly impossible for international student-athletes, international student-athletes may engage in (and earn financial compensation for) NIL activities for compensation in their home country at that time. As explained by the University of Florida International Center (n.d.) website, international student-athletes working in their home country may represent both US and international organizations. But while international student-athletes can represent a variety of companies while in their home countries, they are not able to complete similar work while they are in the US. Completing NIL work, including taking social media posts while on campus

or in the United States would be a violation of the F-1 student visa and would have to be reported, as it would be considered “off campus” work. Individuals who receive an F-1 visa can only be employed on campus for a maximum of 20 hours per week. Student-athletes spend at least 20 hours per week, if not more with athletics. NIL is not considered on-campus employment. As a result, international student-athletes are likely earning compensation related to their NIL, as doing so would jeopardize ability to stay in the US and compete in intercollegiate athletic competition.

Challenge of NIL as Currently Written

The conversation surrounding student-athlete financial compensation is not new, nor is the sentiment free from controversy (Knoester & Ridpath, 2020). There have been arguments that student-athletes are already compensated by way of an athletic scholarship; but only 6.8% of student-athletes receive a full scholarship (Coakley, 2017). Additionally, college athletics produces \$15 billion in revenue every year, but student-athletes do not receive a share in the revenue they assist in producing (Nocera & Strauss, 2016). Often such logic leads to the sentiment that student-athletes are exploited by the very institutions they are representing (e.g., Fresh, 2022; Knoester & Ridpath, 2020; Smith, 1990).

Due to the nature of sport participation of international students and the specifics of that ‘work,’ college sport is a unique application of the F-1 visa. Over the past few years, courts and administrative bodies have shown an increased willingness to find student-athlete labor as work, including finding student-athletes to be employees in some contexts (see Ehrlich, 2019; Ehrlich, 2020). This trend matured last year in three distinct ways: with the Supreme Court’s decision in *NCAA v. Alston* (2021), where the unanimous Court repeatedly referred to the labor market of student-athlete labor¹; a memorandum by the general counsel of the National Labor Relations Board expressing her prosecutorial opinion that student-athletes participating in Division I revenue sports are employees under federal labor law (Abruzzo, 2021); and two decisions by the U.S. District Court of the Eastern District of Pennsylvania holding that the student-athlete plaintiffs plausibly pled a joint employment relationship between them, their attended schools, and the NCAA (*Johnson v. NCAA*, 2021a; *Johnson v. NCAA*, 2021b).²

¹ This is not even to mention Justice Kavanaugh’s solo concurrence in *Alston*, where he repeatedly compared the student-athlete labor market to various unquestionable employment relationships while arguing that “[t]he NCAA’s business model would be flatly illegal in almost any other industry in America (*NCAA v. Alston*, 2021, p. 2167).

² These decisions are currently under appeal at the Third Circuit Court of Appeals.

Federal immigration policy remains stagnant, classifying student-athletes as purely students rather than workers. Thus, in some ways, international student-athletes are stuck between two categories of visa classifications—not quite the pure students envisioned under F-1 regulatory classifications but also not workers envisioned under specialty job visa classifications like H1-B (specialty jobs). Interestingly enough, the P-1 visa category is specifically designed for international athletes but is by statute only applicable to professional athletes and an extremely narrowly tailored class of amateur athletes that explicitly does not include NCAA-eligible student-athletes (Weber, 2022). Given the distinct differences between F-1 visas and the work-related visas, NIL has only exacerbated this frustration.

Suggestions

The first suggestion involves the entire student-athlete population, as all student-athletes should be educated about the rules and regulations as it pertains to the NIL (Grambeau, 2020). Such education should not be limited to building a personal brand (Parmentier & Fischer, 2012) or social media strategy (Geurin, 2016), but programming should include financial literacy (Rubin et al., 2021) as well as legal implications of NIL (McCarthy, 2021). Although student-athletes have been found to be in favor of profiting off of their NIL, student-athletes fail receive effective instruction in regard to their NIL (Grambeau, 2020). International student-athletes should be aware of the laws regarding their student visa as well as the rules regarding NIL as they are currently written.

NIL legislation only applies to international student-athletes when they are studying in the US. Therefore, if international student-athletes are not in the US, F-1 visa employment restrictions are not applicable. Athletic departments should employ the forementioned strategies to assist international student-athletes in obtaining NIL opportunities in their home countries.

It is also important to note that the NCAA (2021) Division I Manual does not mention NIL regulations. To ensure equality across the membership, the NCAA needs a formal NIL policy to be included their yearly manual publication. With this, specific considerations for international student-athletes should be included. NCAA membership institutions should be aware of how NIL can impact an international student-athletes' visa status, and how to help them understand the legality of signing NIL deals.

Perhaps the simplest solution to the dilemma international student-athletes face rests in the hands of Congress. As Weber (2022) suggests, federal legislation could “create a new category of [athlete] visa [in the P category] for athletes to earn income from their name, image, and likeness” (pp. 20-21). But in the

absence of that seemingly unlikely scenario, college sports stakeholders could potentially find options through careful navigating of the F-1 requirements. For example, immigration attorney Jon Velie saw a legal grey area between active and passive NIL income; arguing that while international student-athletes who actively sign autographs or appear in television commercials would be breaking the law, more passive forms of engagement like simply lending a license to print their likenesses on t-shirts might be deemed permissible (Lever, 2021). Additionally, it may also be possible for international student-athletes to retain their Olympic sponsorships deals while in school, so long as any active work is done outside of the US.

Along the same lines, with most student-athletes funding part, if not all their educational experience (Coakley, 2017), athletic departments can work with international student-athletes to allow them to benefit from their NIL based on demonstrated need. Since the beginning of the worldwide COVID-19 pandemic, many international student-athletes have been forced to remain in the US due to travel restrictions (Toresdahl & Asif, 2020). Families have faced financial hardships (and still do) due to the pandemic (Bhavsar et al., 2021). As Bhavsar et al. (2021) stated, “International students are on one of the most vulnerable social groups during the COVID-19 pandemic, ignored by social and financial welfare programs” (p. 171).

The US government required international students applying for a F-1 visa to demonstrate “financial ability” or “the financial resources to live and study in the United States” (Homeland Security, n.d., para. 1). Thus, international students are only permitted to work on-campus (USCIS, n.d.). Legislation does not allow institutions to compensate student-athletes for their NIL (Carrasco, 2021). ICE (2022) does allow for international students to apply for off-campus employment; however, international students must demonstrate need or hardship. Therefore, perhaps international student-athletes who are experiencing financial difficulties due to the COVID-19 pandemic should consider filing a waiver to be allowed to work off-campus and benefit from NIL. Bound et al., (2021) noted that while there are restrictions on many visa types in the US, student visas are not as limited.

To fill this gap, the NCAA and member institutions could perhaps make an exception to NIL legislation by allowing institutions to compensate international student-athletes for their NIL. Such a gesture could allow this population to work within the confines of the F-1 visa restrictions. Athletic departments could create an on-campus position for student-athletes to complete NIL deals, or they could help student-athletes create NIL deals that go alongside their program of study, making them classify as Curricular Practical Training allowing student-athletes to legally work off-campus with their F-1 student visa. Not only would this

benefit international student-athletes financially, but it would also link the NIL deals they sign (and related work) to their course of study.

In addition to bringing experience from their home countries, often, international students are paying full price to attend the institution (Cantwell, 2015). As noted previously, international students often have a difficult time adjusting to campus life in the US (Gold, 2016; Ma, 2020; Mukminin, 2019; Newell, 2015; Rajapaksa & Dundes, 2003; Ridinger & Pastore, 2000; Tang et al., 2018; Telbis et al., 2014; Xing & Bolden, 2019). Studies (Luo et al., 2019; Newell, 2015; Ra & Trusty, 2017; Sullivan & Kashubeck-West, 2015) demonstrate the important role institutional support plays in assisting international students in acclimating to life in US. Utilizing offices across campus to support international student-athletes is necessary (Navarro et al., 2020).

For more than a century, student-athletes were denied basic human rights—the right to their own name, their own image, and their own likeness (Smith, 1990). In recent years states have passed their own NIL legislation and senate committees have formed to advocate for the rights of student-athletes; however, student-athletes who hail from international borders have been forgotten. There needs to be a migration policy for the international student-athlete population, ensuring all student-athletes have the right to monetize from their NIL.

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