

PROTECTING YOUR POSSIBILITIES PODCAST WITH LUKE FEDLAM

Episode 42: The Race to NIL: Ohio's Proposed Name, Image and Likeness Legislation | May 25, 2021

The following is a transcription of the audio podcast recording. It is largely accurate but in some cases it is incomplete or inaccurate due to inaudible passages or transcription errors.

Luke: I'm sports attorney Luke Fedlam, and welcome to the Protecting Your Possibilities podcast. Each conversation we focus on sharing information and having conversations around how athletes can best educate and protect themselves or their life outside of their sports.

Thank you so much for tuning in to the protecting your possibilities podcast. I'm your host, Luke Fedlam. And I am excited for another episode. And if you have been listening to me over the past nearly a year now, you would know that I love talking about name, image and likeness. And I think it's important to talk about name image and likeness, because it is going to be one of the most significant changes to the business of college sports that we've seen, in the last 70 years. And understanding those changes, it's so critical for student athletes, because now there is a business that is really happening around them that they can participate in. And so having a full understanding and knowledge of what to expect how to protect themselves is going to be so critical in ensuring that they don't get taken advantage of.

So I'm talking about name, image and likeness today, really, because of a couple things. There have been so many changes and updates and moving parts over the last couple of weeks that I thought it was important to share a little bit of what's going on. And I think it's important also, because here in the state of Ohio, which is where I'm located, on Monday, legislation regarding name, image and likeness was introduced to the Ohio legislature. So we'll get into the specifics of that. But broadly speaking, what we are seeing is a flurry of activity by state legislators. And this activity really has to do with the fact that name image and likeness is coming.

So taking a step back, and I know our regular listeners, I appreciate you. And I know that you've heard me say this before, but when California passed their Bill 206, back in 2019, and they pass it into law, the writing was on the wall that name image and likeness changes are coming. Now with California, they said it wouldn't go into effect until 2023, which would ultimately give the NCAA and institutions time to adjust and prepare. Well, when Florida passed their state legislation regarding name, image and likeness, they made it scheduled to go into effect July 1 of this year. And that happened, you know, earlier last year. And so we've known that this was coming.

But there have been so many other things that have kind of captivated the attention, rightly so of athletic departments and institutions, i.e. COVID, and dealing with COVID-19, racial and social injustice and race relations. So a lot of things going on. But nevertheless, name image and likeness changes are coming. And so now we're in this place where we really are only a handful of days away from July 1, I mean, we're at 30 plus days, 30-35 days away. And we know that there are multiple states that have not only passed name, image and likeness legislation, I think

the number at this point is up to 12 or 13. But we have a handful of states whose name image and likeness laws are set to go into effect this July.

So looking at states like Alabama, Arizona, New Mexico, Georgia, Mississippi, all scheduled to go into effect this July. And here in Ohio with this legislation that has been introduced, if passed, and then signed by the governor, it will go into effect July 1 of this year. And you can imagine that state legislatures across the country are all racing to not be left out when it comes to not just recruiting, but also retention of student athletes.

So recruiting is something that most people understand that if one state has named image and likeness rules in effect, and another state doesn't, that the state that has those rules, in effect will have a recruiting advantage because student athletes will want to go to schools within that state to be able to earn compensation that they otherwise wouldn't be able to earn in a state that doesn't have those rules in effect. So that's recruiting and I think that most people understand that. The flip side of that is also retention. And so what we've seen this year is the approval of a one-time transfer rule where student athletes can enter a transfer portal and transfer to another school and not have to sit out for a year and can play immediately.

And so when that is the case, if you have a state that has named members and likeness rules in effect, they could go after student athletes. Who are in states that don't have those rules in place, and recruit those student athletes to say, hey, come to this, you know, XYZ school where you can earn compensation outside of your sport. And that's just going to be a significant recruiting advantage. And a poaching advantage for schools who are looking to get talent from other schools. So again, we have this patchwork quilt that's being sewn together of name, image and likeness rules at the state legislative level.

So let's talk about Ohio for a second. And then we'll go into what we see potentially happening at the federal level after that, as it relates to Ohio. If you listen to a podcast episode I did a few weeks back, I spoke about the unique nuances of different states laws. And I mentioned there, and I'll say it here again, most states have in their name, image, likeness legislation common language, or at least common themes when it comes to some of the basic components of name image and likeness legislation, that being that a student athlete can earn compensation off of their name, image and likeness, that they could hire a professional advisor or professional representation, whether that's an agent, advisor or attorney. And that would not cause them to be ineligible, that they can continue to receive their scholarship, even if they're earning compensation through name, image and likeness. So these are some of the common themes that we see across all states legislation when it comes to name, image and likeness.

But there are also some unique differences. And that's what I want to talk briefly about here as it relates to Ohio to just share what some of its unique differences are. So one of them is that a student shall disclose the proposed contract, a name image and likeness contract, at least 15 days before the date the student intends to enter into the proposed contract. So what does that mean? It just basically means that if a student athlete wants to sign on to a name, image and likeness opportunity, that they have to provide that opportunity, a copy of that contract, whether it's written or if it's verbal, provide the terms verbally to a point of contact within the institution. And then they cannot sign or agree to do that or to execute that contract for at least 15 days. And so what is that 15 day period? What does that mean, and I think it's important to share from both sides the pros and the cons.

So in the side of the school, the reason I'm sure that they want those 15 days is for a couple things. One, they want to make sure that they can review the contract and have a full

understanding of what their student athletes are actually getting involved in, and with whom. But also, there's language in this legislation that requires the student or prevents the student rather from a sharing or showing a sponsor's product or logo during official team activities, or any other time if that requirement is in conflict with a provision of a contract to which the institution is a party.

So you could imagine then, if the school or the institution has a contract with a particular brand, if a student athlete were to sign on to some contract or is presented with a contract and wants to sign on to that contract, the school is going to take that 15 day period to determine whether or not those two contracts are in conflict. And so whether or not based on what the school's agreements are, that are in place, if a student athlete were to sign on to or be presented a contract that could potentially be in conflict with something that the school has going on, that gives them the time to review that. Let's be very clear, though, this 15 day period is not for the school to help advise the student athlete as to whether or not the contract that they have been presented is a good or a bad contract, or whether the student athlete should sign or not sign that contract.

Schools would open themselves up to liability exposure if they got in that type of position where they're telling student athletes what deals to do or not do. So it really is a 15 day period for the school to make sure that everything's good and kosher with their specific contracts that they have in place with their brands and their sponsor, partner companies.

Now on the student athletes side of this 15 day period is the idea that there's some risk there, right? I mean, on the one hand. And as you all know, you listen to me talk on a weekly basis, I'm always talking about student athlete empowerment, professional athlete empowerment. So 15 days is a great period of time to slow the process down, I constantly preach to my clients and to others that I present to, hey, listen, you want to slow the process down, if somebody wants you to sign on to a deal right away, usually, that's a red flag. You got to be eyes wide open on what it is they want you to do and have a full understanding of what it is they're asking you to sign on to with haste. So typically, I would say 15 days is a great period of time to be able to slow things down and just understand what it is getting presented to you, do your due diligence and determine whether or not you want to do the deal.

However, in sports, we also know how quickly things happen. So if you were to think about a star athlete, an elite athlete who has more traditional sports marketing opportunities than Yes, 15 days would not be out of the norm, in terms of a player presenting the that contract to the school, the school and taking their time to be able to review it. And the athlete finalizing that the terms of that contract. But when we think about name, image and likeness, and the opportunity that it presents to other student athletes who are not necessarily the elite of the elite, who do something outstanding in their sport, let's say that creates a viral moment, those viral moments only last for a period of time. And so if the student athlete then gets presented opportunities to somehow get involved in marketing, based on a viral moment that they had, if that student athlete now has to wait for 15 days, that is a lifetime.

And those opportunities could disappear for that student athlete because of that, that 15 day period. So it really goes both ways. And it can be seen both ways, and it'll be interesting to see what that looks like in practice. Overall, I think that a 15 day period, again, is something that could have some positive effects on student athletes, but at the same time have some negative effects, as well, when they're getting involved in these opportunities.

So thinking about this from a broader perspective, a couple other things to highlight. The legislation talked specifically about how student athletes will not be able to engage with any company or brand that manufactures or sells controlled substances, marijuana products, medical marijuana, or recreational marijuana, alcohol, tobacco, smoking, etc. I mean, this is stuff that we see at the professional sports level. So it wasn't surprising to see that included here in this legislation either. So again, a pretty balanced, pretty balanced legislation, you can tell it's not very long, is really trying to get to the point of very quickly, how can Ohio not be left behind other states when it comes to being able to offer name image and likeness opportunities for a student athletes throughout the state?

So all that being said, where does that leave us? Maryland just passed legislation related to name image and likeness last week. So states are all getting involved in passing this legislation, Illinois just passed legislation as well. And so we're going to continue to see that over the next six weeks, we will absolutely see other states passing their legislation regarding name, image and likeness. But there are two things going on, I think that will help to make sense of all of this. One is we know that the NCAA has a meeting scheduled for June 22, and 23rd, where name image and likeness will most likely come up and could potentially be voted on from a perspective of updating the rules that the NCAA has to allow for name, image and likeness.

That's one way in which we could see all states have the opportunity or student athletes in all states to have the opportunity to earn compensation or earn money from name image and likeness. And the other thing that's happening is at the federal level, there is a lot of discussion around federal legislation. And I think we're going to see some legislation be presented that will be balanced, and that would have the opportunity to gain the support that it needs to be able to be passed and then ultimately signed into law. And that will be very interesting because that is where I think we'll have a much better understanding of who is going to be responsible for monitoring all of this. And that really is one of the most significant questions that athletic departments are dealing with right now. We know that most athletic departments have compliance staff that is stretched thin. And the idea of having the responsibility for ongoing monitoring of name image and likeness opportunities is a lot to put on a compliance department.

And on top of that, to be honest, most compliance professionals in athletic departments don't have a full understanding of what is fair market value. Right? I mean, let's just have a quick conversation here on this, the idea of fair market value is a tough one, right? Because at the college level, we haven't seen it before. So what is fair market value? Well, it would be hard to say, because we don't know exactly what a college student athletes value is worth, because college student athletes have never been paid before. Right. So there's that argument, then the other argument is to say, well, we could figure this out. Because we know the value of social media impressions, we know the value of someone's time for making appearances based on their celebrity status. And we've seen at the professional level, what professional athletes transitioning from college into the pros, have been able to earn from marketing deals and marketing opportunities. But to think about that, if you're a compliance staff, you've never had to deal with that before. So to understand what fair market value is, is tough.

And on top of that, if you start to look at things like those elite of the elite athletes who are able to receive, let's say, marketing advances, because it's known how much they're going to make from marketing deals, it would be interesting. I haven't seen any state legislation that has spoken out directly about student athletes receiving marketing advances, where, hey, if you were an elite quarterback, let's say that was a Heisman Trophy candidate that had a great career was in the middle of a great career had another year of eligibility and you were playing in this upcoming year, that name image and likeness is in effect, then you could conceivably say,

well, it would be fair market value for that student athlete to receive a marketing advance where it's truly just an advance on their future earnings, that would not require them to do anything right now.

So now you have a professional in the compliance department who has never dealt with those situations that would have to decide about fair market value. It's just, it's a lot. And so I think at the federal legislative level, we're going to end up seeing who ultimately will be responsible for monitoring these name, image and likeness opportunities. There have been discussions about the Federal Trade Commission, there have been conversations about the creation of a new and separate oversight entity for name image and likeness opportunities at the college level. The NCAA, obviously, is talked about the third party administrator that's been put on hold for months and months now, as we see how this all plays out. So a lot of questions are still to be answered.

But I think over the next five, six weeks, we're going to get much more understanding and clarity around what this regime is going to look like. But I do think that we are in for a wild ride over the next 12 to 18 months. And as I always say, education is key. Education is absolutely the cornerstone of name, image and likeness and ensuring that student athletes are not taken advantage of and that they're set up for success as they plan for their future. So much, much more to come over the coming weeks, a lot more discussions to be had, but had to give this update just based on some recent news here in the state of Ohio, and that we've seen in other states across the country.

But again, I just got to say thank you for tuning in. Thank you for listening. Thank you for rocking with me. Please do feel free to share this podcast with others. Feel free to like it, rate it, send comments, shoot me an email if there are topics you want to see me get into or if you want to see me dive deeper into a particular area of a topic. I love the feedback and love the comments that I get from everybody. But again, thank you so much for tuning into the protecting your possibilities podcast. Again, I appreciate you and I hope you have a great day.

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