



**HUSCH BLACKWELL**

# **The State of College Athletics**



*Provided for the 2023 winter meeting of TAACUBO*



# Presenters

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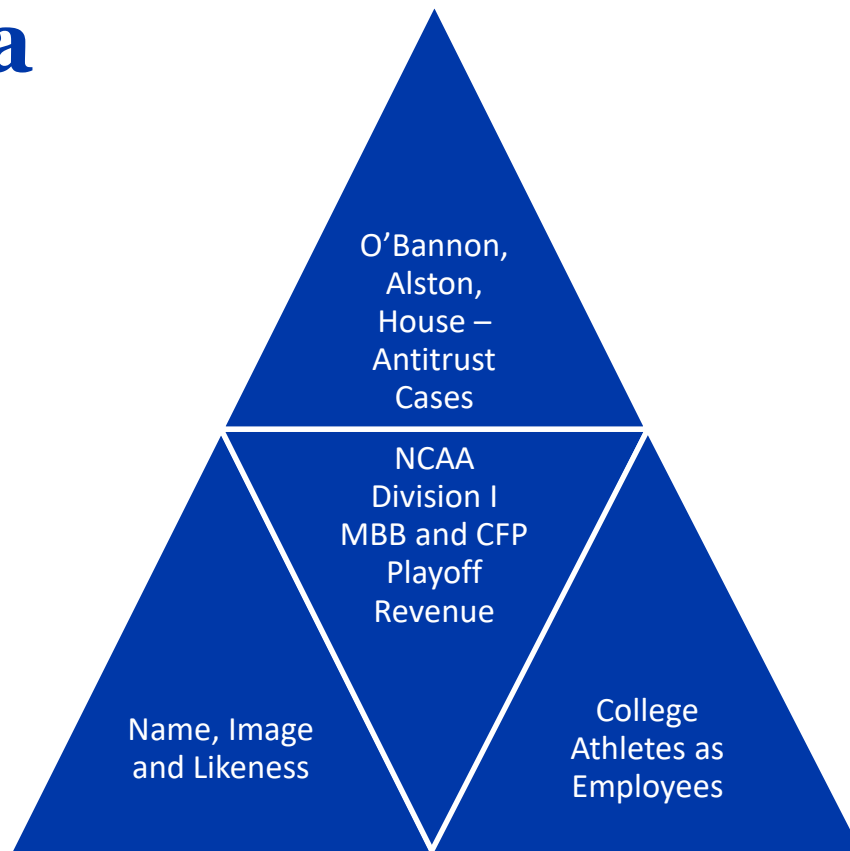


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# Agenda



# Live look at the State of College Athletics

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- Antitrust Cases
- Revenue Distribution
- Name, Image and Likeness
- Athletes as Employees
- The Transfer Portal
- Gender Equity
- Conference Realignment
- Transformation Committee
- New NCAA President

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# O'Bannon and Alston and House, Oh My...



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# O'Bannon, Alston, House

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- Three-pronged attack on the collegiate model of athletics: anti-trust litigation, state legislation, and employment law claims.
- *NCAA v. Oklahoma* (1984): NCAA loses, “the essential ‘character and quality’ of NCAA sports—what ‘differentiates’ NCAA sports from professional ones—has long been that participants in NCAA sports are both amateurs and students at the schools for which they play, i.e., that they “must not be paid[ and] must ... attend class,” *id.* at 102. Board of Regents further instructed that “the preservation of the student-athlete in higher education ... is entirely consistent with the goals of the Sherman Act.” *Id.* Accordingly, this Court explained, rules that limit “eligibility” to enrolled students who are not paid to play “are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive” for purposes of antitrust challenges. *Id.* at 117.



# O'Bannon, Alston, House

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Act 1: O'Bannon v. NCAA, 802 F.3d 1049 (9<sup>th</sup> Cir. 2015)

- NCAA Division I football and men's basketball players challenged the NCAA's use of the name, image and likeness of its former student-athletes for commercial purposes.
- Litigated 2009-2015.
- Result – Trial court found rules limiting student-athlete compensation violated anti-trust law. Athletes entitled to receive scholarships up to full cost of attendance + ~~\$5,000~~. Supreme Court denied cert.
- NCAA amateurism rules remained in place.



# O'Bannon, Alston, House

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Act 2: NCAA v. Alston, 141 S. Ct. 2141 (2021)

- Same trial court as O'Bannon, but this time challenged restrictions related to education-related compensation.
- Restrictions related to “non-cash education-related benefits” violated antitrust law. NCAA may limit cash or cash equivalent awards for academic purposes but not less than what the NCAA permits student-athletes to receive for athletics performance, \$5,980 per year.





# O'Bannon, Alston, House

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NCAA v. Alston, June 21, 2021 – Supreme Court upheld finding that certain NCAA rules violated Section 1 of the Sherman Antitrust Act

- Limited issue related to NCAA rules limiting “education-related benefits” with huge implications
- NCAA can no longer rely on NCAA v. Board of Regents of the University of Oklahoma (1984) dicta to support antitrust protection
- Judge Kavanaugh’s concurring opinion suggests all NCAA compensation rules (e.g., scholarship limits) “raise serious questions under antitrust laws”
- NCAA Amateurism rules remain in effect ... kind of.

# Alston Awards

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11.24.2021 | Texas Athletics

## Texas student-athletes set to receive additional financial support

*Beginning with the 2022 spring semester, Longhorn student-athletes can earn supplemental support through the Academic Enhancement Benefits program.*

## Ole Miss Breaks Ground on Post-Alston Ruling 'Extra Benefits'



The Rebels are the first to take advantage of the recent Supreme Court ruling allowing schools to hand down payments for academic achievements.

## South Carolina Athletics Provides Alston Funds to All Student-Athletes

General | April 28, 2022 | Alston Ruling Creates Opportunity for Student-Athletes in All 21 Sports

## Illinois to Offer Financial Benefits for Academic Progress

Men's Basketball | 7/7/2022 10:02:00 AM

## Delaware to Provide Opportunity for Alston Academic Money to Men's and Women's Basketball Student-Athletes



# O'Bannon, Alston, House

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Act 3: House v. NCAA, U.S. District Court for N.D. of Cal.

- Same trial court again, plaintiffs alleging the NCAA and named conferences violated antitrust law by prohibiting athletes from earning compensation based on NIL from third parties and that football and basketball players should have the ability to share in telecast group licensing revenue.
- Not set for trial until January 2024.

# Name, Image and Likeness

SPORTSMONEY • EDITORS' PICK

## Cavinder Twins, Stars On TikTok And Basketball Court, Are Nearing \$2 Million In NIL Deals, With More Ahead

### Alabama QB Bryce Young Nets NIL Deal with BMW of Tuscaloosa

The Heisman Trophy winner will be repping a different German automobile than Nick Saban.

TONY TSOUKALAS • MAR 5, 2022 11:28 PM EST

SPORTSMONEY

### UConn's Paige Bueckers Becomes First College Athlete To Sign With Gatorade, Could Earn \$1 Million In Endorsements

Adam Zagoria Contributor  
*I'm a basketball and tennis insider*

Follow

Nov 30, 2021, 05:53pm EST



# UNT boosters form NIL collective lure, pay top student-athletes

By Brett Vito Staff Writer [bvito@dentonrc.com](mailto:bvito@dentonrc.com) Jul 29, 2021



JACKSON STATE

## Jackson State QB Shedeur Sanders becomes first HBCU player to sign NIL deal with Gatorade



**Khari Thompson**

Mississippi Clarion Ledger

Published 11:40 a.m. CT Jan. 27, 2022

[View Comments](#)



## Texas QB Quinn Ewers Shows Off New Aston Martin From NIL Deal

Name Image and likeness continues to help future athletes like Quinn Ewers land deals with top end companies

ADAM GLICK • JUN 9, 2022 12:00 PM EDT

# Name, Image and Likeness

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## 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

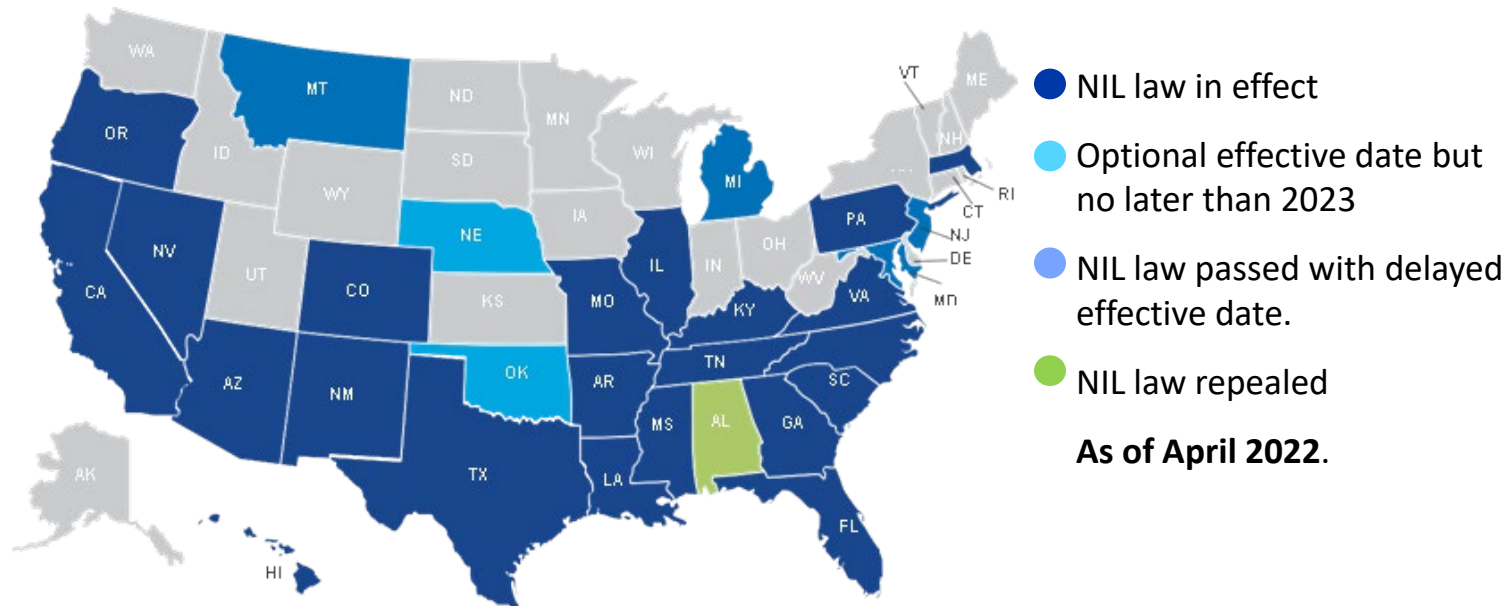
## NAIA and NCAA Rules

NAIA deregulated rules related to NIL in October 2020; NCAA tabled proposed rules in January 2021.

## Texas Law

SB 1385, effective July 1, 2021

# Name, Image and Likeness



- NIL law in effect
- Optional effective date but no later than 2023
- NIL law passed with delayed effective date.
- NIL law repealed

**As of April 2022.**



# Name, Image and Likeness – Texas Law

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- Prospects cannot earn compensation based on their NIL;
- Student-athletes can earn compensation from NIL activities when not engaged in “official team activities,” as defined by the institution;
- Student-athletes must disclose all NIL activity to the institution;
- Student-athletes can obtain professional representation to negotiate NIL agreements;
- Institutions cannot recruit prospects with a promise of NIL compensation;
- NIL compensation cannot be in exchange for athletic performance;
- The institution cannot provide compensation to a student-athlete for his or her NIL;



# Name, Image and Likeness – Texas Law

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- A student-athlete's NIL activity cannot conflict with a team contract, institutional contract, policy of the athletic department or honor code;
- **NIL compensation cannot be in exchange for property owned by the institution or while using institutional intellectual property or other property owned by the institution;**
- Student-athletes cannot engage in an NIL activity related to alcohol, tobacco products, e-cigarettes or nicotine delivery device, anabolic steroids, sports betting, casino gambling, firearms (that cannot be legally purchased), or sexually oriented businesses;
- The duration of a student-athlete's contract for an NIL activity cannot extend beyond the student-athlete's participation in the intercollegiate athletics program;
- Sale of autographs by student-athletes is specifically permitted; and
- The institution must require student-athletes to attend a 5-hour financial literacy and life skills workshop.



# Name, Image and Likeness



## New NIL Twist: Alumni, Collectives Pledging Cash to College Athletes



Dec 15, 2021

[Paul Steinbach](#)



Money for college athletes is being pledged by the millions in a new development six months into the name, image and likeness era, raising concerns about the role of wealthy alumni eager to back their beloved alma maters.

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# Reported value of Jaden Rashada NIL deal did not make economic sense

Jeremy Crabtree • 01/19/23

Article written by:



Jeremy Crabtree  
 [jeremycrabtree](#)



(Photo by James Gilbert/Getty Images)



# NIL – Call to Action by Power 5 Commissioners

- Letter sent to Senator Tommy Tuberville (R-Ala) and Senator Joe Manchin (D-W. VA)
- Outlined 6 key pillars that are integral to a fair and enforceable federal framework for NIL:
  1. A national standard allowing all athletes to earn compensation from third parties;
  2. Prohibiting pay-for-play as well as **outlawing booster involvement in recruiting**;
  3. Providing protections for athletes, including assurances that agents “are subject to meaningful regulation” and access to appropriate dispute resolution processes for student-athletes;
  4. Banning advisors/third parties from obtaining “long term rights” to a student-athlete’s NIL;
  5. Requiring deals to commensurate with **market rates for NIL activity**; and
  6. Requiring athletes to disclose NIL deals to their university.

# Oregon Ducks running back Travis Dye enters transfer portal, weighing return to UO, per source

Updated: Jan. 14, 2022, 11:07 a.m. | Published: Jan. 14, 2022, 9:35 a.m.



Oregon's Travis Dye celebrates after scoring his second touchdown of the day as the No. 11 Ducks host the Oregon State Beavers in their annual college football rivalry game on Saturday, Nov. 27, 2021, at Autzen Stadium in Eugene. Photo by Serena Morones for The Oregonian/OregonLive. Serena Morones for The Oregonian/OregonLive

# Transformation Committee





# Division I Transformation Committee - Purpose

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- Appointed by the Division I Board of Directors to lead modernization efforts after the adoption of the new NCAA constitution
- Areas of priority for the committee:
  1. Elevating support for student-athletes' mental, physical and academic well-being
  2. Enhancing the Division I championships experience for student-athletes
  3. Building a faster, fairer and more equitable Division



# Division I Transformation Committee - Factors of Success

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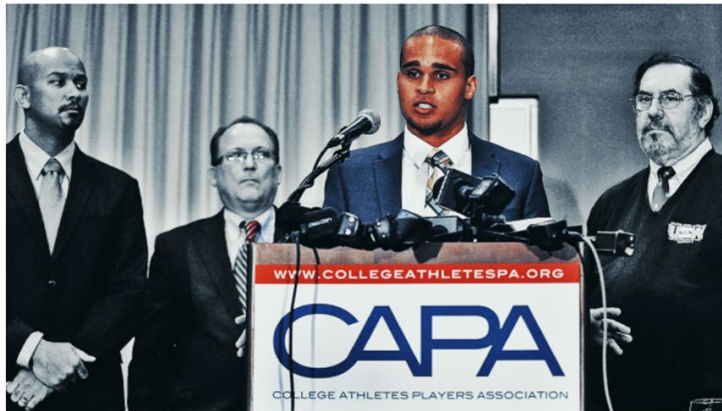
- Committee members agreed that success would be measured by two factors:
  1. Whether its recommendations modernize the experience of today's student-athletes; and
  2. Whether the recommendations ensure the continued integrity of intercollegiate athletics?
- Member schools have been empowered to provide additional support to student-athletes in the areas of health and safety, financial expenses, and other benefits over the past few months.

# College Athletes as Employees

## UNFAIR LABOR CHARGE AGAINST NCAA MAY OFFER NLRB A NEW TEST CASE

BY DANIEL LIBIT, MICHAEL MCCANN

NOVEMBER 16, 2021 12:00PM



Six years after Northwestern football players were denied union rights by the National Labor Relations Board, a former Minnesota regent believes he's given the agency just what it needs to gut amateurism.

AP/PAUL BEATY

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# College Athletes as Employees

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- New NCAA Constitution, The Principle of Amateurism was eliminated in favor of the Collegiate Student-Athlete Model.
- Collegiate Student-Athlete Model = “Student-athletes may not be compensated by a member institution for participating in a sport but may receive educational and other benefits in accordance with the guidelines established by the division.”
- Scholarships, + COA (\$6,000 +), + Education-related benefits (\$5,980) + NIL = Employment?

# College Athletes as Employees

## Classifying college athletes as employees, NLRB memo sets stage for further NCAA destabilization

The NCAA's power continues to diminish as athletes earn more rights and opportunities



By [Dennis Dodd](#) Sep 29, 2021 at 5:52 pm ET • 6 min read



OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 21-08

September 29, 2021

TO: All Regional Directors, Officers-in-Charge,  
and Resident Officers

FROM: Jennifer A. Abruzzo, General Counsel

SUBJECT: Statutory Rights of Players at Academic Institutions (Student-Athletes)<sup>1</sup> Under  
the National Labor Relations Act

# College Athletes as Employees - Johnson v. NCAA (Aug.2021)

## Federal Judge Refuses to Dismiss Action Seeking to Classify Student-Athletes as Employees

Wednesday, September 1, 2021

A case that may signal the continued erosion of the amateur status of college student-athletes will continue as the action in *Ralph “Trey” Johnson et al. v. NCAA* has survived the defendants’ motion to dismiss the complaint.

U.S. District Court Judge John Padova allowed the six student-athlete plaintiffs’ claims against Villanova, Fordham, Sacred Heart, Cornell and Lafayette to proceed as he concluded the schools had failed to show at this stage of the litigation that the student-athletes were not employees. The student-athletes brought their claims as a proposed collective or class action. They seek to be classified as employees pursuant to the Fair Labor Standards Act (FLSA) and state labor laws and be entitled to paid minimum wage.

Judge Padova’s 30-page order discussed familiar arguments made by the plaintiffs’ attorney Paul McDonald in *Berger v. NCAA*, a 2016 case decided by the U.S. Court of Appeals for the Seventh Circuit. In *Berger*, the Seventh Circuit rejected the “employee” argument, concluding the amateur status of college athletes prevented their classification as employees of their individual schools. Judge Padova rejected the schools’ argument that the student-athletes are enrolled as students and do not perform functions of an employee.



A Villanova Wildcat wide receiver catches a pass in a Sept. 9, 2017, game against the Temple Owls.  
Photo by Mitchell Leff/Getty Images

## NCAA Hit With Another Lawsuit Seeking Pay for Athlete’s Play (3)

Understanding Johnson v. NCAA, the next case that could upend the college sports model



By Nicole Auerbach and Mike Yorkunov Aug 12, 2022

# Contract Negotiation

ESPN

## THE BOOM OF DEAD MONEY IN COLLEGE SPORTS



- According to an ESPN analysis of financial records of athletics departments at public universities, FBS programs spent more than \$533.6 million in dead money in an 11-year period from Jan. 1, 2010, to Jan. 31, 2021.
- Remarkably, the dead money total is actually much more than that. The financial records did not include payments for many of the coaches who were fired during or after the 2020 football and 2020-21 basketball seasons. In football alone, FBS schools committed another \$107.6 million in severance pay before mitigation to fired coaches and their staffs in 2020.

# Michigan State athletics completes partnership deal with Caesars Sportsbook

 **Matt Charboneau**  
The Detroit News

Published 11:15 a.m. ET Jan. 13, 2022 | Updated 11:39 a.m. ET Jan. 13, 2022

[View Comments](#) 

Michigan State is going all in, and that's not just on the playing field.

On Thursday, the university announced it was partnering with Caesars Sportsbook to become the official and exclusive sports betting and iGaming partner of MSU Athletics.



Sparty leads out the football team. Special To The Detroit News



## Big Trouble At Tulane

**Allegations of sexual assault and hazing at Tulane University**  
by DOUGLAS S. LOONEY  
Special reporting by Associated Press

The lies in the lawsuit's pages... This troubling phrase came from the mouth of a Tulane football player...



...acted by unnamed donors...  
...the office of the Orleans Parish District Attorney...  
...will be the state's attorney...

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# Other Key Issues in Athletics

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- NCAA Board of Governors Campus Sexual Violence Policy
  - Disclosure
  - Confirm and Share
  - Written Procedures
- Gender Equity Review
  - Bundling of other championships with men's basketball championship resulted in deflated valuation of women's basketball championship.



# Hope Springs Eternal

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- New NCAA President
- CFP discussions regarding separating FBS football from NCAA.
- Unwillingness of majority of Supreme Court to wade into pay-for-play argument.
- Games will still be played!
- Even Plaintiff's attorneys love March Madness...