

What legal challenges does a University face when making payments to an international student-athlete for use of the athlete's name, image and likeness?

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by J. Mike Sevilla and Nicholas J. Pappas

As many of us review our busted brackets ahead of this weekend's Final Four match ups, universities across the country are preparing for the imminent changes to the rules governing name, image, likeness^[1] ("NIL") payments to student-athletes, including whether the immigration laws permit international student-athletes to receive such compensation. The National Collegiate Athletic Association ("NCAA") historically has prohibited its member universities from compensating their student-athletes in order to preserve the traditions of amateurism. A series of lawsuits over the years have chipped away at the NCAA's prohibition on paying student-athletes for use of their NIL. See *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015); *National Collegiate Athletic Association v. Alston*, 594 U.S. 69 (2021). In 2021, the NCAA agreed to allow student-athletes to benefit from their NIL but continued to prohibit member universities from making such payments. See <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx>. As a result, NIL collectives^[2] formed to facilitate payments to student-athletes for use of their NIL. In the latest development, a groundbreaking settlement agreement in a class action lawsuit slated for finalization on April 7, 2025 will require the NCAA to pay approximately \$2.8 billion in back payments to Division I student-athletes going back to 2016 and create a revenue sharing pool to allow universities to directly pay student-athletes for the use of their NIL. See *In re College Athlete NIL Litigation*, 4:20-cv-03919, (N.D. Cal.). These changes are fast approaching at the start of the 2025-2026 academic year, which begins on July 1, 2025. See https://www.knightcommission.org/wp-content/uploads/KnightCommissionBrief_HousevNCAA_182025.pdf. This article explores the complications arising out of making direct payments to international student-athletes in F-1 student visa classification and highlights potential alternative visa classifications that may resolve the issue.

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Background

Because upwards of 20,000 international students participate in collegiate athletics, universities wishing to recruit top international student-athletes have had to learn about

the risks associated with making NIL and revenue sharing payments to these international student-athletes. See <https://generalcounsel.uoregon.edu/name-image-and-likeness-international-student-athletes>. The F-1 student classification, which covers most international students during their studies in the United States, allows foreign nationals to enter the country as full-time students at an accredited college, university, and other educational institution. See 8 C.F.R. § 214.2(f). Because this classification focusses on the student's studying, and not working, the regulations clearly limit employment options available to students in F-1 status.

These international students can lawfully obtain authorization to work under limited circumstances: on-campus employment, curricular practical training (CPT), and optional practical training (OPT). See 8 C.F.R. § 214.2(f)(9)-(10). The on-campus employment option is limited to twenty hours per week when school is in session. See 8 C.F.R. § 214.2(f)(9)(i). The CPT option is intended for use during the attainment of the degree in a manner where the CPT training relates directly to the student's major area of study. See 8 C.F.R. § 214.2(f)(10)(i). OPT is intended for use after the completion of the student's degree program and should also be in a field related to the student's major area of study. See 8 C.F.R. § 214.2(f)(10)(ii). As such, the employment authorization afforded by the F-1 visa classification does not allow for direct NIL and revenue sharing payments to international student-athletes.

In July 2021, the Student Exchange Visitor Program (SEVP), a program within U.S. Immigration and Customs Enforcement (ICE) overseeing student visas, indicated in a Broadcast Message that it "continues to assess the issue of F and M international student-athletes receiving compensation for the use of their name, image and likeness... and will provide additional updates through Broadcast Messages, Study in the States, social media and SEVP field representatives." See <https://www.ice.gov/doclib/sevis/pdf/bcm2107-02.pdf>. But to date SEVP has provided no update or guidance. Given the lack of clarity from SEVP, universities face significant risk in making payments to international student-athletes in F-1 status. However, alternative visa classifications may allow student-athletes to seek appropriate employment authorization to accept NIL and revenue sharing payments and to engage in full-time study.

NIL and Revenue Sharing Payments

For NIL and revenue sharing payments to comply with immigration laws, practitioners should seek to classify the payments within the scope of one of the three forms of work authorization or classify the payments as falling outside the definition of employment under the immigration laws. USCIS examines the specific activity conducted by the foreign national and location of the foreign national, when assessing whether work authorization is required.

One solution based on existing F-1 work authorization proposed by immigration practitioners is for the international student-athlete to enroll in a "Business of Sports Management", or similar, class, or series of classes, which would enable the international student to utilize CPT to obtain work authorization. See 8 C.F.R. § 214.2(f)(10)(I). The

theory is that the NIL activity, and thus payment, constitutes training and relates directly to the student's major area of study. This CPT work authorization could allow the international student to earn NIL income, while enrolled at a university.

If the payments or activities fall outside the definition of employment under the immigration laws, more options exist. First, a popular approach across universities is to ensure international students receive payment and engage in promotional activities in their home countries. See <https://generalcounsel.uoregon.edu/name-image-and-likeness-international-student-athletes>. Immigration agencies review work authorization compliance from a geographic perspective and are concerned with work that occurs on U.S. soil. As such, this strategy should prevent a violation of the prohibitions of employment without work authorization in F-1 status because the payments and activities will occur outside the authority of the immigration agencies. Second, NIL deals for passive income, where the student-athlete is not engaged in activities to receive payment fall outside the definition of employment. See <https://generalcounsel.uoregon.edu/name-image-and-likeness-international-student-athletes>. Such passive income includes, for example, licensing of an international student's NIL to a university for use on jerseys, t-shirts, photographs from practices or games, etc. The definition of what constitutes passive income has been subject to dispute, so the university and student-athlete should review these payments closely with an immigration attorney. Another proposed solution involves classifying international students as independent contractors for the purpose of these payments. The regulations provide that employers are not required to complete Form I-9 for an independent contractor. So, universities could make these payments without being required to verify the student-athlete's work authorization. See <https://www.uscis.gov/i-9-central/form-i-9-resources/handbook-for-employers-m-274/20-who-must-complete-form-i-9>. Although the regulations would support such classification, the Department of Labor may scrutinize such independent contractor classifications closely and has historically been hostile to such classifications. If the Department of Labor does not agree with the classification, it could take the position that the student-athlete should have completed a Form I-9. Having not completed one, despite the university believing the student-athlete did not need to, would result in a Form I-9 violation. See 8 C.F.R. § 274a; <https://www.uscis.gov/i-9-central/form-i-9-resources/handbook-for-employers-m-274/140-some-questions-you-may-have-about-form-i-9>. Because of this risk, universities and student-athletes should proceed carefully if they choose this option.

Alternative Visa Classifications

One way universities may seek to avoid the risks described above is to find a visa classification that does allow for direct NIL and/or revenue sharing payments. The most commonly explored visa classifications for international student-athletes are the P-1A, internationally recognized athletes; O-1A, athletes of extraordinary ability; and J-1 exchange visitor. These visa classifications allow for full-time study at the university level, but these nonimmigrants must abide by the rules of their status and cannot extend their stay in the United States for the purposes of completing a program of study or a degree. See

<https://www.ice.gov/doclib/sevis/pdf/Nonimmigrant%20Class%20Who%20Can%20Study.pdf>. Further, these visa classifications allow the international student-athlete's agent or an NIL collective to serve as a petitioner, rather than the university. As such, these alternative visa classifications significantly mitigate the risks associated with accepting payments under the permissible work authorization associated with F-1 status and any attempts to work around the limitations of F-1 work authorization.

The P-1A classification applies to athletes with internationally recognized reputations or those who are members of an athletic team that is internationally recognized. See 8 C.F.R. § 214.2(p)(1)(ii)(A). Further, this classification requires the university to show that the "competition is at an internationally recognized level of performance such that it requires that caliber of athlete or team to be among its participants or that some level of participation by internationally recognized athletes is required to maintain its current distinguished reputation in the sport." See <https://www.uscis.gov/policy-manual/volume-2-part-n-chapter-2>. Frequently, student-athletes receiving interest from an NIL and revenue sharing perspective are internationally recognized.

The O-1A applies to athletes at the very top of their field. See 8 C.F.R. § 214.2(o). Because of this exacting requirement the O-1A may not be suitable for most international student-athletes. A crucial factor here could be the strength of the collegiate athletics program that the international student will be seeking to join.

The J-1 visa classification is intended for participants in educational and cultural exchange programs. See 8 C.F.R. § 214.2(j). In order for the J-1 visa to be a viable option, the international student would need to enter the United States as part of a specific exchange program through a sponsoring entity that would allow for the participation in NCAA collegiate athletics.

[1] Name, image, likeness refers to a person's legal right to control how their image is used, including commercially.

[2] NIL collectives are support networks for college athletes where donors pool together money to compensate athletes for their name, image and likeness.

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