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THE NCAA'S NAME, IMAGE & LIKENESS RULES:

Effects on International Student-Athletes

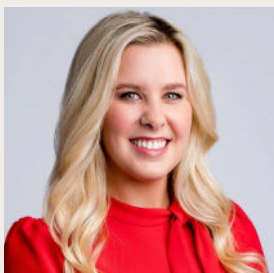


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Background

Effective July 1, 2021, the National Collegiate Athletic Association (NCAA) adopted the [Interim Name, Image and Likeness \(NIL\) Policy](#) allowing NCAA student-athletes the opportunity to benefit from their NIL. The NCAA provided [clarifying guidance](#) in May. In short, athletes can engage in NIL activities that are consistent with the law of the state where the school is located.¹ College athletes who attend a school in a state without an NIL law can engage in NIL activity without violating NCAA rules.

The federal agencies that regulate foreign student activities have not yet issued guidance on whether, and to what extent, the 20,000 foreign college students on F-1 visas may benefit from their NIL. In this paper we (i) summarize where things stand today, (ii) highlight near-term options that warrant consideration, and (iii) recommend options for how the university may move forward.

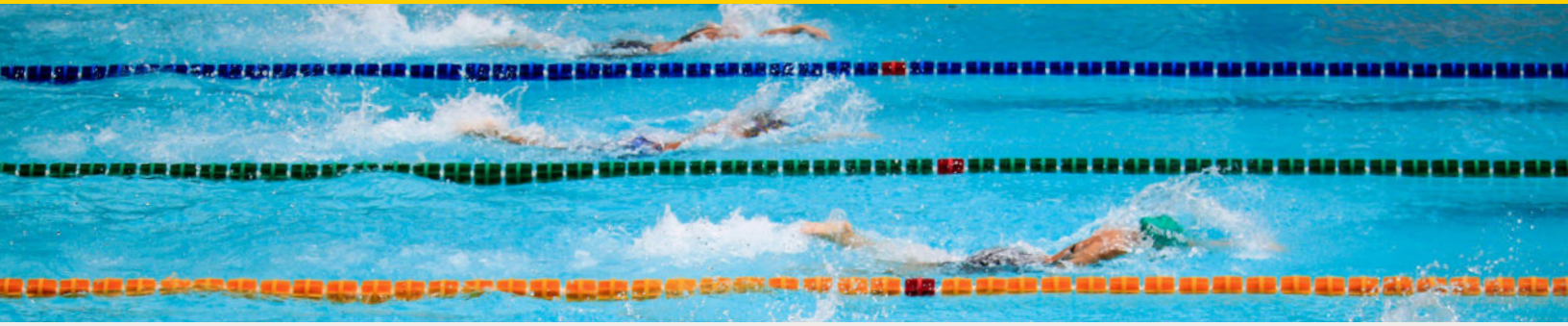
Current Legal Framework for F-1 Student Visas

Most student-athletes are in the United States on an F-1 student visa,² which does not permit them to work except in limited circumstances.³ F-1 students may only engage in "on-campus employment," subject to certain conditions and restrictions, "curricular practical training," after their first academic year and upon approval of the Designated School Official (DSO), or if authorized for Optional Practical Training (OPT). Students must otherwise apply for employment authorization with USCIS prior to engaging in "pre-completion practical training," post-completion/extension of OPT, employment with an international organization, or if seeking employment because of "severe economic hardship."

Does the activity constitute employment?

The regulations governing the terms of foreign student status do not define employment. The government has, however, issued guidance regarding employment for business visitors. In that context, there are two primary considerations: (1) the activity must qualify as "business"⁴ and (2) the individual may not receive a salary from a U.S. source for services rendered in connection with his/her activities in the U.S.⁵ The term "business" is defined in State Department regulations as "conventions, conferences, consultations and other legitimate





activities of a commercial or professional nature. It does not include local employment or labor for hire.”⁶ There is long-standing precedent which provides that where the principal place of business and the actual place of eventual accrual of profits, at least predominantly, remains in the foreign country, the activities are permissible business activities.⁷ The State Department’s Foreign Affairs Manual (FAM) provides a number of permissible business activities, which would also be permissible on a F-1 student visa.⁸

The below outlines options universities may consider for international student-athletes.

Status of Policy Making within the Government

Universities lack guidance as to what constitutes impermissible employment (i.e. a violation of nonimmigrant status) in the context of NIL deals. To date, the U.S. government has not provided any guidance on NIL.⁹

The BAL Government Strategies team has been in direct touch with the Director of the SEVIS Program, which has primary oversight responsibility over foreign students. She confirmed that they are working through guidance with other federal agencies. There is no timeline for promulgation of any guidance.

Strategic Options for F-1 Employment

Absent government guidance, universities will want to consider several options to support their foreign student-athletes. Each of these options would likely involve risks for the university or the foreign students and should only be undertaken following further review with legal counsel.

On Campus Employment (With Approval of DSO)

F-1 students may apply for “on-campus employment” subject to certain conditions and restrictions. On-campus employment includes work performed: (1) on the school premises (including on-location commercial firms which provide services for students on campus, such as the school bookstore or cafeteria) as long as the work directly provides services for students; or (2) at an off-campus location which is educationally affiliated with the school; the educational affiliation must be associated with the school’s established curriculum or related to contractually funded research projects at the post-graduate level.¹⁰



All on-campus employment must be an integral part of the student's educational program and must not exceed 20 hours a week while school is in session.

Some students may benefit from this option depending on their major, student services provided on campus, and/or the school's off-campus affiliations. School-specific NIL collectives may be structured in a way that would allow the collective to hire student athletes to engage in on-campus employment on behalf of the collective provided the above requirements are met.

NIL Activities and Payment from Abroad

International student-athletes may accept NIL deals where NIL-related activities are primarily performed abroad and are paid from a source outside of the U.S. without violating the terms of their F-1 status. Some incidental activities performed in the U.S., such as posting to social media on a limited basis, may be permissible. Student-athletes may need to set up a business entity abroad if receiving income from a U.S. source.

Extreme Hardship Work Authorization

F-1 students may request employment authorization based on "severe economic hardship" caused by unforeseen circumstances beyond the student's control. These circumstances may include a loss of financial aid or on-campus employment without fault on the part of the student, substantial fluctuations in the value of currency or exchange rate, inordinate increases in tuition and/or living costs, or unexpected changes in the financial condition of the student's source of support, medical bills, or other substantial and unexpected expenses.

Some student-athletes may be able to demonstrate severe economic hardship to seek off-campus employment, including employment related to a NIL deal. Eligibility for this option will need to be assessed on a case-by-case basis. This exception would not be broadly applicable to all international student-athletes.

Passive Income

Certain NIL payments may be allowed where no actual "work" is being done. For example, where a student-athlete is merely "opting in" to a larger agreement as a member of a team, but is not actively taking any other action in the marketing of their NIL, this would not likely be considered work and may be allowed on an F-1 visa. This would be limited to truly "passive" situations and would not allow for students to accept personal endorsement deals, nor would it allow them to participate in any active NIL activities within the U.S. There are risks in this

approach if payments come from a U.S. source, which is not generally permissible on a B-1 business visa, and thus also not likely permissible on an F-1 student visa. Absent guidance from the U.S. government providing that such passive payments from a U.S. source are permissible for F-1 student athletes, universities should proceed with caution.

Alternate Forms of Payment

F-1 students who receive alternative forms of payment from a U.S. source for NIL deals, such as cryptocurrency or NFTs, or who enter a contract wherein remuneration is paid to a guardian or put in escrow, could be found to have violated their F-1 student visa status.

As with passive income, alternate forms of payment pose risks if payments come from a U.S. source, which is not generally permissible on a B-1 business visa, and thus not likely permissible on a F-1 student visa. Without guidance from the U.S. government as to whether such payments from a U.S. source are permissible for F-1 student-athletes, universities should proceed with caution.

Alternative Visa Classification: P-1 Visa

Some student-athletes may qualify for a P-1 performer visa, which authorizes them to work in the United States incident to their P-1 status. Specifically, the P-1 visa allows athletes to enter the United States to perform at specific athletic competition as an athlete, individually or as part of a group or team, at an internationally recognized level or performance. The P-1 visa allows for promotional activities that are incidental and/or related to the sport.

P-1 visa holders must seek to enter the U.S. temporarily and “solely for the purposes of performing.” However, ICE guidance provides that P-1 principal visa holders may study “incidental to their primary purpose for being in the United States.” Whether the U.S. government would consider full-time study as “incidental to their primary purpose for being in the United States” is unclear.

This option may give international student-athletes the most flexibility to accept NIL endorsements and deals. However, the P-1 visa has not traditionally been used for college athletes and it is unclear how the U.S. government would treat a P-1 application.

¹State laws relating to NIL vary. States and schools may impose reporting requirements.

²Student-athletes may also be in the U.S. on another nonimmigrant visa or in some other status (e.g., DACA, Temporary Protected Status (TPS), etc.). Requirements and/or restrictions on employment may vary.

³Employment authorization is governed by 8 C.F.R. 274a.12.

⁴See 9 FAM 402.2-5(A).

⁵See 9 FAM 402.2-5(F)(1).

⁶See 22 C.F.R. 41.31(b)(1).

⁷Matter of Hira, 11 I&N Dec. 824 (BIA 1966 aff'd by A.G. in 1966); 9 FAM 402.2-5(B).

⁸See 9 FAM 402.2: <https://fam.state.gov/FAM/09FAM/09FAM040202.html>.

⁹On July 19, 2021, 19 days after the NIL policy went into effect, Immigrations and Customs Enforcement (ICE)'s Student and Exchange Visitor Program (SEVP) issued a Broadcast Message that said it “continues to assess the issue of F and M international student-athletes receiving compensation for the use of their name, image and likeness. SEVP will continue to monitor current and pending state and federal legislation on this issue and will provide additional updates.”

¹⁰C.F.R. 214.2(f)(9)(i).

Looking Ahead

We are entering a critical period of policymaking by government agencies, but it is too early to say how senior policymakers are thinking about the issue. BAL's Government Strategies team will continue to engage with policymakers at the various federal agencies to monitor developments.

In the interim, the university may wish to sharpen its thinking on which policy solutions are most preferable and increase their advocacy surrounding this issue. That could be accomplished through direct engagement by the agencies with policy makers or by working through various trade organizations. BAL would welcome the opportunity to help the university strategize and achieve its goal of supporting foreign student-athletes. One initial recommendation would be for BAL to coordinate a confidential discussion amongst a handful of universities where representatives could discuss options and approaches and ways to engage with the government.



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