

Battle of the Bills: How Four Federal NIL Bills Depict Continued Uncertainty Over a Uniform NIL Standard



Photo Source: Hector Alejandro, *Stephen Hill NCAA Football 12 Cover Art*, FLICKR (Nov. 9, 2011)

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Introduction:

Starting on July 1, 2021, the NCAA allowed college athletes to participate in endorsement arrangements using their name, image, and likeness (NIL).¹ Specifically, the NCAA's Board of Directors voted to approve an interim NIL policy that permits all student-athletes to use professional services providers for commercial activities related to their brand, allowing these athletes to generate profits from their NIL.² In response, multiple states have enacted subsequent legislation to govern and restrict these endorsement arrangements, and a flurry of new federal bills have been introduced by senators and congressmen to create uniformity with respect to NIL rights and responsibilities.³ Among the federal bills that have been proposed, none have ever made it out of committee.⁴ The new round of four federal bills introduced or revised in 2023

¹ See Troutman Pepper, *State and Federal Legislation Tracker*, (last visited Oct. 10, 2023) <https://www.troutman.com/state-and-federal-nil-legislation-tracker.html> (providing an overview and survey of up-to-date NIL laws and policies for student-athletes in each state).

² See NIL Legislation Tracker, *Your Guide to Federal and State Laws on Name, Image and Likeness Rules for NCAA Athletes*, Saul Ewing (last visited Oct. 10, 2023) <https://www.saul.com/nil-legislation-tracker> (providing general information regarding the interim NIL policy and a tracker including a list of passed NIL state laws as well as pending NIL legislation).

³ See *Troutman Pepper* (providing that multiple states and congressman have responded to NCAA's authorization of athletes to engage in endorsement arrangements utilizing their NIL); see also Kristi Dosh, *4 New Federal NIL Bills Have Been Introduced In Congress*, Forbes (Jul. 29, 2023) <https://www.forbes.com/sites/kristidosh/2023/07/29/4-new-federal-nil-bills-that-have-been-introduced-in-congress/?sh=7e3da5204d46> (describing four federal bills that have been introduced in an attempt to create uniformity with respect to an NIL standard).

⁴ See *Dosh* (stating “although nearly a dozen bills have been introduced at the federal level over the past few years, none have ever made it out of committee”).

include similar and disparate provisions, illustrating the lack of consensus regarding a uniform NIL standard.⁵

College Athlete Economic Freedom Act:

The College Athlete Economic Freedom Act establishes an unrestricted right for student-athletes to market the use of their NIL by prohibiting colleges, conferences, and the NCAA from implementing rules that restrict how athletes can use their NIL.⁶ One unique aspect of the revised 2023 bill is a provision allowing international student-athletes to exploit their NIL without violating their F-1 student visa status.⁷ The provision also protects these students if college athletes become employees of their colleges or universities.⁸ The other notable provision of this bill is that universities and conferences must obtain a group license from athletes for using their NIL in any type of promotion.⁹ Universities and conferences must also notify athletes of how their NIL was used and the revenue generated from the deal, allowing athletes to negotiate for a fair share of the revenues.¹⁰ UCLA quarterback, Chase Griffin, endorsed the bill stating “a unanimous Supreme Court, the Department of Justice Antitrust Division, and states across the country have emphatically recognized the right of college athletes to share in the economic freedoms that are the bedrock of the American Dream . . . NIL has enabled college athletes, like me, to become small business owners, taxpayers, support the families that raised us, contribute to charities, and re-invest in the communities that we represent.”¹¹

⁵ See *id.* (stating “the fact that multiple bills with such varying priorities have been introduced illustrates that we still don’t have a consensus about what a federal NIL standard should look like”).

⁶ See Murphy Senate, *Murphy, Trahan Reintroduce Legislation to Codify College Athletes’ Unrestricted Right to their Name, Image, Likeness*, (Jul. 26, 2023) <https://www.murphy.senate.gov/newsroom/press-releases/murphy-trahan-reintroduce-legislation-to-codify-college-athletes-unrestricted-right-to-their-name-image-likeness> (providing a list and description of each provision within the College Athlete Economic Freedom Act, and stating the Act would “establish an unrestricted federal right for college athletes and prospective college athletes to market the use of their name, image, and likeness --- individually and as a group --- by prohibiting colleges, conferences, and the NCAA from setting or enforcing rules that restrict this right or otherwise colluding to limit how athletes can use their NIL”).

⁷ See *Dosh* (stating one unique part about the Act is a provision permitting international college athletes to exploit their NIL without violating their F-1 student visa status); see also *Murphy Senate* (providing the Act would allow international college athletes to use their NIL in the same way that non-immigrant college athletes can, without losing F-1 visa status).

⁸ See *Dosh* (indicating that the Act protects international college athletes if college athletes, in general, are found to be employees); see also Valerie K. Jackson and James B. Thelen, *NLRB General Counsel Files Complaint Demanding College Reclassify its Student-Athletes as Employees*, Littler, (May 22, 2023) <https://www.littler.com/publication-press/publication/nlr-general-counsel-files-complaint-demanding-college-reclassify-its> (providing that the National Labor Relations Board (NLRB) filed a complaint on May 18, 2023 against the University of Southern California (USC), PAC-12 Conference, and NCAA claiming that their failure to use the term “employee” in reference to college athletes in the university’s handbook discourages student athletes from exercising their alleged Section 7 rights under the National Labor Relations Act. USC, PAC-12, and NCAA are to appear for hearing in an administrative law court in Los Angeles on November 7, 2023).

⁹ See *Dosh* (stating the Act requires schools and conferences to obtain a group license from athletes for using their NIL in any type of promotion, including through media rights deals).

¹⁰ See *Murphy Senate* (stating schools and athletic associations must notify athletes of how their NIL was utilized and how much revenue was generated from those deals, allowing athletes to earn a fair share of the revenues).

¹¹ *Dosh*

Protecting Athletes, Schools and Sports Act of 2023:

The Protecting Athletes, Schools and Sports Act of 2023 protects college athletes, maintains fair competition and compensation, establishes transparency in NIL activities, and preserves the tradition of college sports.¹² One significant provision in this bill involves the transparency of NIL activities.¹³ Specifically, the bill requires the following: 1.) agents and collectives to register with a regulating institution; 2.) NIL deals be disclosed within 30 days; and 3.) the establishment of a public-facing website to publish anonymized data.¹⁴ The bill also imposes a limitation on transferability as student-athletes cannot transfer without penalty until completing their first three years of academic eligibility, subject to a few exceptions.¹⁵ NCAA President Charlie Baker endorsed this bill stating “this important legislation . . . includes key measures to increase consumer protections and transparency in the NIL market, and aims to protect women’s and Olympic sports.”¹⁶

Student Athlete Level Playing Field Act:

The Student Athlete Level Playing Field Act is designed to establish one federal NIL standard and a level playing field for amateur athletics.¹⁷ The first unique provision requires deals exceeding \$500 to be uploaded to an FTC clearinghouse.¹⁸ The second noteworthy provision ensures student-athletes are not deemed employees of their respective colleges or universities, impacting the *Johnson v. NCAA* case and NLRB’s claims against the NCAA, PAC-12 and University of Southern California.¹⁹

¹² See Manchin Senate, *Manchin, Tuberville Introduce Legislation to Address Name, Image and Likeness in College Sports*, (Jul. 25, 2023) <https://www.manchin.senate.gov/newsroom/press-releases/manchin-tuberville-introduce-legislation-to-address-name-image-and-likeness-in-college-sports#:~:text=Washington%2C%20DC%20%E2%80%93%20Today%2C%20U.S.,honored%20tradition%20of%20college%20sports> (providing a list and description of each provision within the Protecting Athletes, Schools and Sports Act of 2023, and stating the Act “protect(s) student-athletes, maintain(s) fair competition and compensation, strengthen(s) transparency, and preserve(s) the time-honored tradition of college sports”).

¹³ See *Dosh* (stating agents and collectives must register with a regulating body in order to satisfy one factor of the transparency of NIL Activities standard).

¹⁴ See *Manchin Senate* (stating the three elements of improving the transparency of NIL activities are as follows: 1.) requiring agents and collectives to be registered with a regulating body; 2.) implementing a public-facing website to publish anonymized data related to NIL; 3.) requiring NIL contracts to be disclosed within thirty days).

¹⁵ See *id.* (providing the standard for moderating the transfer portal as requiring college athletes to complete their first three-years of academic eligibility before being able to transfer without penalty); see also Josiah Elmore, *Tuberville Introduces Federal Legislation for NIL; Transfer Portal in College Sports*, CBS42 (Jul. 25, 2023) <https://www.cbs42.com/news/tuberville-introduces-federal-legislation-for-nil-transfer-portal-in-college-sports/> (stating the exceptions that allow a student-athlete to transfer under the Act are death or terminal illness in the family, and termination or role switch of athlete’s primary position coach or head coach).

¹⁶ *Dosh*

¹⁷ See *The Student Athlete Level Playing Field Act One Pager* (last visited October 10, 2023) <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://cleaver.house.gov/sites/evo-subsites/cleaver.house.gov/files/The%20Student%20Athlete%20Level%20Playing%20Field%20Act%20-%20One%20Pager.pdf> (providing a one-page overview of the Student Athlete Level Playing Field Act and stating the Act essentially sets a uniform standard and a level playing field).

¹⁸ See *Dosh* (stating “this bill also contemplates involvement from the FTC, requiring deals for more than \$500 to be uploaded to an FTC clearinghouse that would be established”).

¹⁹ See *id.* (stating that the Act establishes that student-athletes are not considered employees in colleges or universities); see also Josh Goldberg and Carter Gaines, *What You Need to Know About Johnson v. NCAA*, GreenspoonMarder (May 1, 2023) <https://www.gmlaw.com/news/what-you-need-to-know-about-johnson-v-ncaa/> (providing an overview of the *Johnson v. NCAA* case and stating student-athletes argue they should be compensated for the time they spend practicing and competing in sports); see also *Jackson and Thelen* (indicating the NLRB

College Athletes Protection and Compensation Act:

The last bill, College Athletes Protection and Compensation Act, establishes federal NIL standards and protects the economic opportunities of student-athletes; establishes a medical trust fund that covers out-of-pocket expenses for injuries; prioritizes student athlete’s education by requiring institutions to continue to provide financial aid in the event of an injury; safeguards student-athlete’s health and wellness; requires schools to report the revenues and expenses of their athletics program; and ensures gender parity in tournaments.²⁰ This bill sets clear and fair rules to protect the economic opportunities, educational results, and health of student-athletes.²¹

Comparing the Acts:

These acts overlap and simultaneously contrast in various ways, depicting uncertainty in the future of a uniform NIL standard.²² The College Athlete Economic Freedom Act and Protecting Athletes, Schools and Sports Act of 2023 have similar provisions, allowing the Federal Trade Commission to enforce penalties against colleges and universities for violating the respective bills.²³ Similarly, the Protecting Athletes, Schools and Sports Act of 2023 and College Athletes Protection and Compensation Act have analogous provisions ensuring protection of student-athlete’s health and safety.²⁴ Finally, the Student Level Playing Field Act and College Athletes

asserted that the failure to use the term “employee” in reference to college athletes in university handbook discourages student athletes from exercising their alleged Section 7 rights under the National Labor Relations Act).

²⁰ See *College Athletes Protection and Compensation Act Discussion Draft by Senators Blumenthal, Moran, and Booker One Pager* (last visited October 10, 2023) chrome-extension://efaidnbnmnibpcjpcglclefindmkaj/https://cleaver.house.gov/sites/evo-subsites/cleaver.house.gov/files/The%20Student%20Athlete%20Level%20Playing%20Field%20Act%20-%20One%20Pager.pdf (providing a one-page overview of the College Athletes Protection and Compensation Act, bullet-pointing each provision).

²¹ See *id.*

²² See *Dosh*

²³ See *Murphy Senate* (providing the College Athlete Economic Freedom Act provision that states the Act would “assert robust enforcement for violations by colleges, conferences, or the NCAA in restricting athletes’ NIL rights, notably through asserting per se antitrust penalties, a private right of action for athletes to pursue civil action against violators, and authorizing the Federal Trade Commission (FTC) to levy ‘unfair or deceptive practice’ penalties”); see also *Manchin Senate* (providing the Protecting Athletes, Schools and Sports Act of 2023 provision that states the Act would “strengthen enforcement and oversight by directing the NCAA to oversee and investigate NIL activities and report violations to the Federal Trade Commission”).

²⁴ See *Manchin Senate* (providing the Protecting Athletes, Schools and Sports Act of 2023 provision that states the Act would strengthen the health and safety of college athletes by “guaranteeing health insurance for sports-related injuries for uninsured student-athletes for 8 years following graduation from a 4-year institution; requiring institutions generating more than \$20 million and \$50 million in athletics revenue to pay out-of-pocket expenses for two and four years, respectively; requiring institutions to honor the original scholarship commitment made to a student-athlete; implementing a Uniform Standard Contract for student-athlete use for NIL deals; and enhancing curriculum on financial literacy, NIL rights, and related legal and regulatory issues”); see also *College Athletes Protection and Compensation Act Discussion Draft by Senators Blumenthal, Moran, and Booker One Pager* (providing the College Athletes Protection and Compensation Act provision that states “the framework would establish health, wellness, and safety standards to protect college athletes from serious injury, mistreatment, abuse, and death”).

Protection and Compensation Act have similar provisions establishing an oversight committee for student-athletes entering into NIL deals.²⁵

Incongruously, the College Athlete Economic Freedom Act and Protecting Athletes, Schools and Sports Act of 2023 seem to clash with respect to protection of higher education institutions.²⁶ Specifically, the College Athlete Economic Freedom Act imposes robust penalties for violations by colleges, universities, and the NCAA if they restrict student-athlete's NIL rights.²⁷ In contrast, the Protecting Athletes, Schools and Sports Act of 2023 emphasizes that schools, conferences, and the NCAA are not liable for their efforts to comply with the provisions of the bill.²⁸ Overall, the disparity in these provisions and lack of decision within Congress yield concerns that a uniform NIL standard may not be feasible.²⁹

²⁵ See *The Student Athlete Level Playing Field Act One Pager* (providing the Student Athlete Level Playing Field Act provision that states “the bill establishes a commission appointed by Congress and made up of a variety of NIL stakeholders, including student athletes. The commission is tasked with continuing to study the logistics of NIL as it is rolled out and providing legislative recommendations to Congress about ways the process could be improved”); see also *Dosh* (indicating the College Athletes Protection and Compensation Act “calls for the creation of the College Athletics Corporation, a central oversight entity tasked with creating and enforcing rules and standards to protect athletes entering into NIL deals”).

²⁶ See *Dosh* (hinting that College Athlete Economic Freedom Act and Protecting Athletes, Schools and Sports Act of 2023 contrast with respect to higher education institution protection).

²⁷ See *Murphy Senate* (stating the College Athlete Economic Freedom Act “assert(s) robust enforcement for violations by colleges, conferences, or the NCAA in restricting athletes' NIL rights, notably through asserting per se antitrust penalties, a private right of action for athletes to pursue civil action against violators, and authorizing the Federal Trade Commission (FTC) to levy ‘unfair or deceptive practice’ penalties”).

²⁸ See *Manchin Senate* (providing the Protecting Athletes, Schools and Sports Act of 2023 protects colleges and universities by ensuring that schools, conferences, and associations are not liable for their efforts to comply with the *PASS Act*, prohibiting NIL agreements that involve alcohol, drugs, or conflict with existing school and conference licenses, and requiring student-athletes to ask permission to make use of existing intellectual property (IP)).

²⁹ See *Dosh*