Steptoe

Steptoe White Paper

The Rewritten Playbook: The New Litigation and Enforcement Risks in College Sports

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I. <u>Introduction</u>

The ubiquity of name, image and likeness (NIL) deals being offered to incoming and enrolled college student-athletes by schools and third-party NIL collectives in the wake of the *House* settlement – a landmark $2.8 billion legal agreement allowing Division I schools to pay athletes directly and ending longstanding NCAA restrictions on student-athlete compensation – has given rise to significant debate over the question of whether college student-athletes should be considered employees of the school for which they play. Regardless of how courts ultimately answer that question, colleges, athletes, and third-party NIL collectives will, in the absence of legislative action, face many of the same litigation and enforcement risks that exist in the context of employer-employee relationships. Most notably, universities will have to consider: (1) litigation risks that arise when an athlete transfers to a competing school in breach of his/her NIL contract, often with the involvement of the transferee school or other third parties; (2) enforcement risks arising from federal and state-law prohibitions on contractual provisions in NIL agreements that restrict the ability of the 'employee' (here, the student-athlete) to transfer to another college; and (3) enforcement risks arising from agreements or implicit understandings, between or among universities (most likely through their athletic departments) to refrain from recruiting student-athletes away from each other's programs. These new risks are ones that universities and their athletic departments and third-party collectives are well-advised to address early from a compliance standpoint.

This white paper is organized in three parts. Section I summarizes the NCAA rules (Rules) governing the recruitment of student-athletes and their transfers from one school to another; how those Rules have changed in the wake of the *House* settlement; and the types of restrictions being placed on student-athletes' ability to transfer via NIL contracts. Section II addresses the litigation and enforcement risks posed by these restrictions. Finally, Section III offers recommendations to institutions of higher education (IHEs), third-party collectives, and student-athletes for minimizing these risks.

II. <u>The Rules Governing Student-Athlete Compensation and Transfer</u>

Historically, the NCAA prohibited universities from compensating student-athletes beyond tuition and fees, room and board, books, and other expenses related to attendance. The Supreme Court's 2021 ruling in *NCAA v. Alston*, and the *House* settlement that followed, radically changed that landscape. This section addresses the historical rules regarding student-athlete compensation and details the current state of student-athletes' ability to transfer universities and receive compensation.

A. The Rules Pre-*House*

1. <u>Student-Athlete Compensation</u>

Prior to 2021, the NCAA enforced a strict amateurism rule that limited student-athlete compensation to the cost of attendance.[1] Student-athletes could not receive benefits unrelated to education and could not even receive certain benefits tied to education, such as "post-eligibility scholarships to complete undergraduate or graduate degrees at any school; scholarships to attend vocational school; expenses for pre- and post-eligibility tutoring; expenses related to studying abroad that are not covered by the cost of attendance; and paid post-eligibility internships."[2] Student-athletes were prohibited from receiving "computers, science equipment, musical instruments and other items not currently included in the cost of attendance calculation but nonetheless related to the pursuit of various academic studies."[3]

In 2021, however, the Supreme Court unanimously held in *NCAA v. Alston* that the NCAA's proscriptions against colleges providing any benefits to student-athletes beyond tuition and fees, room and board, books, and other expenses related to attendance violated the Sherman Act.[4] This ruling effectively marked the end of amateurism in college sports, allowing student-athletes to ink third-party endorsements by licensing their name, image, and likeness[5] or to receive compensation from booster-led organizations in exchange for charitable appearances or endorsements.[6] While *Alston* invalidated restrictions on education-related benefits, the ruling did not address direct compensation to athletes by universities. Accordingly, following *Alston*, the NCAA implemented interim rules allowing student-athletes to earn money by licensing their NIL with third parties while further litigation invited by the *Alston* ruling ensued.[7]

2. <u>Student-Athlete Transfers</u>

Historically, the NCAA restricted athletes even from contacting coaches at other universities about the possibility of transferring absent permission from their team's coach (the "permission-to-contact" model).[8] The rule also restricted coaches from contacting athletes. If permission was denied, student-athletes could appeal to members of the campus administration, and those who did not receive permission could still transfer but could not

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[1] *See In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1071 (N.D. Cal. 2019).

[2] *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1088 (N.D. Cal. 2019).

[3] *Id.*

[4] *NCAA v. Alston*, 594 US 69, 102-07 (2021).

[5] Alex Semancik, *NIL creates opportunity for student-athletes, confusion and tough decisions for schools and NCAA*, Ohio Today (Apr. 8, 2026), https://www.ohio.edu/news/2026/04/nil-creates-opportunity-student-athletes-confusion-tough-decisions-schools-ncaa.

[6] *Name, Image, and Likeness (NIL) Collectives*, IRS, https://www.taxpayeradvocate.irs.gov/get-help/general/nil/nil-collectives/ (last updated June 8, 2026).

[7] *See, e.g.*, *In re College Athlete NIL Litig.*, No. 4:20-cv-03919-CW (N.D. Cal.); *Fontenot v. Nat'l Collegiate Athletic Ass'n*, No. 1:23-cv-03076 (D. Colo.); *Johnson v. Nat'l Collegiate Athletic Ass'n*, 108 F.4th 163 (3d Cir. 2024); *see also,* NCAA, *Interim Name, Image and Likeness Policy Guidance Regarding Third Party Involvement* (Jul. 1, 2021), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/May2022NIL_Guidance.pdf.

[8] Tom VanHaaren, *NCAA Reform Eases Rules on Athlete Transfers*, ESPN (June 13, 2018), https://www.espn.com/college-sports/story/_/id/23782893/ncaa-passes-reform-allows-athletes-transfer-permission.

receive athletic aid benefits at their new school. These strict transfer restrictions placed student-athletes seeking to switch teams in a difficult position.

One example of tampering enforcement in recent years was an NCAA enforcement case involving Southern Utah University's head football coach.[9] The head coach had contact with two student-athletes from other institutions before they had entered the portal. One contact involved a 17-minute phone call with a student-athlete who entered the portal days later and eventually transferred to Southern Utah, while the other involved text messages requesting game film from a student-athlete who had not entered the portal and expressed no interest in transferring. The case resulted in penalties including probation, a fine, recruiting restrictions, a game suspension, and a show-cause order.

The introduction of the transfer portal in 2018, which replaced the permission-to-contact model, significantly reshaped the NCAA's approach to student-athlete transfers.[10] After the implementation of the transfer portal, the number of transfers increased exponentially. At the time the transfer portal was originally created, student-athletes could only transfer once to a new university but would be forced to sit out the first season upon transfer. After an additional rule change to the one-time-transfer rule in 2021, Division I athletes could transfer multiple times and compete immediately at their transfer institution without having to sit out a season on the bench. This rule change further expanded student-athletes' ability to enter the transfer portal. However, the revised rule still limited athletes' ability to transfer schools more than once because student-athletes were required to sit out for one year of competition following the move to a third school.[11]

In December 2023, the transfer rules changed again when a court in the Northern District of West Virginia issued a temporary restraining order that effectively allowed athletes to transfer multiple times without having to sit out for a year upon transfer.[12] In 2024, in response to this ruling, the NCAA again revised its transfer rules to remove limits on the number of times eligible athletes can transfer during their college career.[13]

As the expansion of the transfer portal and influx of NIL offerings expanded transfer opportunities, the NCAA also sought to apply tampering rules more aggressively.[14]

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[9] Meghan Durhan Wright, *Tampering violations occurred in Southern Utah football program*, NCAA (May 29, 2024), https://www.ncaa.org/news/2024/5/29/media-center-tampering-violations-occurred-in-southern-utah-football-program.aspx.

[10] Quentin Williams, *A Brief History of the Transfer Portal*, The Portal Report (Nov. 12, 2025) https://theportalreport.com/2025/11/12/a-brief-history-of-the-transfer-portal/.

[11] John Raby, *College athletes who transfer twice can play, for now, after a judge sets aside NCAA transfer rule,* Associated Press (Dec. 13, 2013), https://apnews.com/article/ncaa-transfer-portal-22ef447ad67826138724cec3cd6ab581.

[12] *Ohio v. Nat'l Collegiate Athletic Ass'n*, 706 F. Supp. 3d 583 (N.D. W. Va. 2023).

[13] Meghan Durham Wright, *Division I Council approves changes to transfer rules*, NCAA (Apr. 17, 2024), https://www.ncaa.org/news/2024/4/17/media-center-division-i-council-approves-changes-to-transfer-rules.aspx.

[14] Meghan Durham Wright, *Hundreds of violations occurred in Tennessee football program over 3 seasons*, NCAA (July 14, 2023) https://www.ncaa.org/media-center-hundreds-of-violations-occurred-in-tennessee-football-program-over-3-seasons/.

However, the liberalized environment for athletes to transfer and enter into NIL contracts following the *Alston* decision made NCAA tampering enforcement more challenging because of the difficulty in distinguishing permissible recruiting from violations. On the other hand, the transfer portal eliminated previous restrictions on the mobility of athletes. This newfound freedom of movement created a more competitive market for athletes who can use the portal to seek new opportunities, and potentially more lucrative NIL packages, through school transfers.

B. The *House* Settlement

The NCAA transfer portal and the landmark settlement in *House v. NCAA*[15] are the driving forces in the movement to replace the amateur college sports model with one that allows athletes to transfer willingly and earn more money in the process. In *House*, the plaintiffs, Grant House (swimming, Arizona State University) and Sedona Prince (basketball, University of Oregon) filed a lawsuit on behalf of a class seeking compensatory damages and injunctive relief from the NCAA and several collegiate conferences, alleging that the NCAA violated the Sherman Act by prohibiting student-athletes from profiting off their NILs.[16] In May 2024, the parties in the consolidated cases reached a class-wide settlement, which was approved in June 2025.[17]

C. The Current Landscape post-*House*

The *Alston* decision and subsequent *House* settlement resulted in a sea change in how student-athletes were compensated. The *House* settlement also invited further legal challenges to the NCAA rules.

1. <u>The *House* Settlement's Changes to Student-Athlete Compensation</u>

Under the terms of the *House* settlement, the NCAA, the defendant conferences, and IHEs that opt into the settlement must abide by the following modifications to the NCAA Rules:

- First, universities may now share athletic revenue with athletes up to a cap of approximately $21 million.[18]
- Second, there is no longer a limit on the number of scholarships each institution is permitted to award its athletes.[19]

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[15] *See* Dan Murphy, *Judge OK's $2.8B settlement, paving way for colleges to pay athletes*, ESPN (June 6, 2025), https://www.espn.com/college-sports/story/_/id/45467505/judge-grants-final-approval-house-v-ncaa-settlement.

[16] Complaint, *House v. Nat'l Collegiate Athletic Ass'n*, No. 4:20-cv-03919-CW (N.D. Cal. June 15, 2020), Dkt. No. 1 (Note that the *House* suit was originally filed before the *Alston* decision. However, because *Alston* did not address direct payments to student-athletes by universities, *supra* I.A.1, the *House* case was not moot as a result of the *Alton* decision).

[17] Dan Murphy, *Judge OK's $2.8B settlement, paving way for colleges to pay athletes*, ESPN (June 6, 2025), https://www.espn.com/college-sports/story/_/id/45467505/judge-grants-final-approval-house-v-ncaa-settlement.

[18] Whitney K. Novak, *College Athlete Compensation: Impacts of the House Settlement*, Cong. Rsch. Serv. (Aug. 15, 2025), https://www.congress.gov/crs-product/LSB11349.

[19] *Id.*

- Third, although athletes may receive compensation from third parties, the NCAA may continue to have rules designed to ensure that NIL deals are for a "'valid business purpose related to the promotion or endorsement of goods or services' and are not simply payments to athletes in return for their enrollment at an institution."[20]
- An independent entity, the College Sports Commission (CSC), will oversee compliance with the settlement and is responsible for implementing the settlement.[21]

a. CSC Review

After *House*, the CSC reviews all student NIL deals with third parties with a total value of $600 or more.[22] After a third-party NIL deal is submitted for review, the CSC will first determine whether the payor is an associated entity or individual, such as boosters and school-connected commercial actors, to ensure that the proposed deal is a bona fide third-party NIL arrangement and not an attempt by the school to evade the $21 million cap on institutional revenue sharing.[23] Whether a third party is an associated entity is still an evolving landscape. Recently, the Magistrate Judge overseeing the administration of the *House* settlement ruled that, depending on the facts of the NIL deal, multimedia rights companies and third-party brands could be considered associated entities that fall under the CSC's purview.[24] Athletes are currently appealing this decision.[25]

The CSC then determines whether the NIL deal has been made for a valid business purpose and does not exceed a reasonable range of compensation.[26] CSC rules state pay-for-play or inducements are not valid business purposes and compensation should be set at rates and terms commensurate with compensation paid to similarly situated individuals.[27] After its review, the CSC can clear the deal, not clear the deal, or flag the deal for further review.[28] If a deal is not cleared, an athlete can revise the deal and resubmit it, cancel the deal, or

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[20] *Id.*

[21] *Id.*

[22] *Student-Athlete NIL Deals*, College Sports Commission, https://www.collegesportscommission.org/nil (last visited June 23, 2026).

[23] *Rules and Policies*, College Sports Commission, https://www.collegesportscommission.org/rules-and-policies (last visited June 23, 2026); *Glossary*, College Sports Commission, https://www.collegesportscommission.org/glossary/ (last visited June 23, 2026).

[24] Order Denying Pls.' Mot. to Enforce the Fourth Am. Stipulation and Settlement Agreement at 4-6, *In re Coll. Athlete NIL Litigation*, No. 4:20-cv-03919-CW (N.D. Cal. June 25, 2026).

[25] Alex Lawson, *Athletes Look To Rein In Review Of 3rd-Party NIL Deals*, Law360 (July 10, 2026), https://www.law360.com/articles/2499713/athletes-look-to-rein-in-review-of-3rd-party-nil-deals.

[26] *Student-Athlete NIL Deals*, College Sports Commission, https://www.collegesportscommission.org/nil (last visited June 23, 2026).

[27] *Rules and Policies*, College Sports Commission, https://www.collegesportscommission.org/rules-and-policies (last visited June 23, 2026).

[28] *Student-Athlete NIL Deals*, College Sports Commission, https://www.collegesportscommission.org/nil (last visited June 23, 2026).

appeal to a neutral arbitrator.[29] Recently, a neutral arbitrator upheld the CSC's rejection of NIL agreements worth more than $7.5 million in total between a marketing firm that secures sponsorships for the University of Nebraska and 18 football players.[30] This was the first, and to date, the only, rejection upheld under the CSC's framework since the *House* settlement.

b. NCAA's New Ghost Transfer Rule

On April 1, 2026, the NCAA Division I Cabinet approved automatic penalties for "ghost transfers" based on a rule change that was proposed by the Football Bowl Subdivision Oversight Committee.[31] Ghost transfers involve decisions by student-athletes to transfer schools based on communication, recruitment, and a decision to transfer prior to an athlete officially entering the portal. The NCAA's newly created penalties apply to all Division I programs and to any transfer on or after February 25, 2026. Penalties include: (a) a suspension of the applicable head coach for 50% of the season; and (b) a fine equal to 20% of the school's sports budget. "If a school does not notify the NCAA within 15 days of its intent to self-apply these penalties, the school will receive written notice of a potential violation, along with the date by which the school must provide evidence demonstrating that a violation did not occur."[32] The Cabinet also approved amendments to the notification-of-transfer window.

Following the recent passage of these new rules on penalties, the NCAA issued an infraction decision on April 14, 2026.[33] Although this decision involved a violation of the old tampering rule, it is a strong indication of the types of enforcement to come under the new ghost tampering rule. The University of Iowa program was cited for tampering violations after its head football coach and an assistant coach had impermissible contact throughout November 2022 with a student-athlete who was enrolled at another NCAA school at the time and had not yet entered the transfer portal. The two coaches collectively had 13 calls with the student-athlete and his father and also exchanged text messages. Following these communications, the student entered the transfer portal and a few days later transferred to Iowa. Both coaches resolved their cases through negotiated resolutions and served suspensions, with one coach publicly accepting responsibility for the rule violations. The school agreed to a self-imposed fine of $25,000, a two-week ban on all recruitment during the 2026 calendar year, a 24-day reduction in recruitment person days, and a one-game suspension for both coaches.

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[29] *Id.*

[30] Dan Murphy, *CSC Wins NIL Arbitration Case Brought by Nebraska Football Players*, ESPN (May 11, 2026), https://www.espn.com/college-football/story/_/id/48745201/college-sports-salary-cap-rules-upheld-arbitration-case-brought-nebraska-football-players.

[31] Meghan Durham Wright, *DI Cabinet adopts new rules to address 'ghost transfers' for all sports*, NCAA (Apr. 1, 2026), https://www.ncaa.org/news/2026/4/1/media-center-di-cabinet-adopts-new-rules-to-address-ghost-transfers-for-all-sports.aspx.

[32] *Id.*

[33] Meghan Durham Wright, *Tampering violations occurred in Iowa football program*, NCAA (Apr. 14, 2026), https://www.ncaa.org/news/2026/4/14/media-center-tampering-violations-occurred-in-iowa-football-program.aspx.

c. NCAA's New '5 on 5' Rule

On June 23, 2026, the NCAA expanded its eligibility rules by permitting Division I student-athletes up to five years of eligibility if they enroll in college no later than the academic year after their 19th birthday.[34] The rule will be effective for all student-athletes enrolling in college full time in fall 2027 or later.[35] Immediately after it was issued, the rule was challenged by students who had already exhausted four years of eligibility.[36] The judge there promptly issued a temporary injunction blocking the rule, allowing the players who sued to return for another season.[37] With the filing of additional similar lawsuits, this rule may see changes as the landscape evolves.

In the post-*House* settlement landscape, the NCAA's renewed focus on tampering compliance underscores the tension between preserving fair competition in college athletics and adapting to a system that mirrors a professional labor market.

III. Three Post-*House* Litigation/Enforcement Risks Arising from College Athletes' New Bargaining Power

New litigation and enforcement risks are emerging from the continuously shifting landscape post-*House* settlement. This section covers three significant risks: (1) private enforcement of contractual restrictions on athlete mobility; (2) government enforcement of contractual restrictions on athlete mobility; and (3) increased coordination among competitor universities that would constitute a *per se* violation of Section 1 of the Sherman Act.

A. Risk No. 1: Private Enforcement of Contractual Restrictions on Athlete Mobility

To address the risk of student-athletes under an NIL contract transferring to another school, schools are employing several contractual mechanisms to limit athlete mobility. While not characterized as non-compete clauses, these provisions attempt to serve the same function: restricting the mobility of student-athletes the school has paid for NIL rights. The types of contractual provisions at a university's disposal to restrict athlete transfer include 'non-compete-like' clauses, non-disclosure provisions, and liquidated damages and clawback clauses. Each of these types of provisions and the potential obstacles to enforcing them are discussed below. In addition, this section addresses the

[34] Meghan Durham Wright, *Division I adopts age-based eligibility model*, NCAA (June 23, 2026), https://www.ncaa.org/news/2026/6/23/media-center-division-i-adopts-age-based-eligibility-model.aspx.

[35] *Id.*

[36] Mike Scarcella, *NCAA hit with class action over new age-based sports eligibility rule*, Reuters (June 26, 2026), https://www.reuters.com/legal/government/ncaa-hit-with-class-action-over-new-age-based-sports-eligibility-rule-2026-06-26/.

[37] Ralph Russo & Justin Williams, *Ohio judge grants injunction to basketball players challenging new NCAA eligibility rules*, New York Times (July 9, 2026), https://www.nytimes.com/athletic/7412510/2026/07/09/ohio-judge-basketball-ncaa-eligibility-rules/.

litigation risks schools that may arise in the context of these contractual provisions, both with respect to the parties to the contract or third-party beneficiaries thereto, and to the obstacles that may arise that could impede enforcement of those provisions in court.

1. Non-Compete Provisions

One method of restricting employee mobility is through the use of non-compete provisions, which are agreements between an employer and an employee whereby the employee agrees not to work for a competing entity. The use of non-competes in the employer-employee context has come under scrutiny recently, with many states passing statutes seeking to regulate its usage. Whether legal restrictions on non-competes apply to student-athletes at US colleges and universities is unclear. Historically, student-athletes have not been considered employees.[38] However, with the *House* settlement now permitting direct payments from universities to student-athletes (albeit for NIL usage and not as employee compensation, at least nominally), an important question arises as to whether the legal principles governing the use of non-compete provisions in the employer-employee context will apply to NIL contracts between student-athletes and their schools.

The inclusion of some sort of 'non-compete-like' provision which imposes restrictions on student-athletes' ability to breach their NIL contracts in order to play with – and provide NIL rights to – another school reduces the risk of the student-athlete transferring to a different program and leaving the school without receiving the benefits of its original bargain with the student. Such provisions can take the form of exclusive NIL rights[39] or prohibitions on transferring to other universities.[40] However, the use of such provisions will not completely eliminate the risk of athlete transfers or guarantee full recovery of losses the university incurs as a result of the student-athlete's breach.

Some states have passed statutes that govern non-compete agreements, while other states have common law frameworks. Statutes governing non-compete agreements range from limiting their usage to a certain duration and distance[41] to near-total bans.[42] For example, California, Minnesota, North Dakota, and Wyoming have outlawed non-compete

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[38] *See Dawson v. NCAA*, 932 F.3d 905, 909-11 (9th Cir. 2019) (holding that student-athletes are not employees of the NCAA or collegiate athletic conference); *see also, Berger v. NCAA*, 843 F.3d 285, 291-93 (7th Cir. 2016) (holding that student-athletes were not employees of their university).

[39] *See* Kevin Paule, *NIL Contracts Test Limits On College Football Transfers*, Law360 (May 26, 2026), https://www.law360.com/competition/articles/2481369?nl_pk=c6263877-93ab-4e19-a61b-e07ccadd940a&utm_source=newsletter&utm_medium=email&utm_campaign=competition&utm_content=2026-05-27&read_main=1&nlsidx=0&nlaidx=15.

[40] *See* Dan Murphy, *Wisconsin sues Miami for tampering with football transfer*, ESPN (June 20, 2025), https://www.espn.com/college-football/story/_/id/45552578/wisconsin-sues-miami-tampering-football-transfer.

[41] *See, e.g.*, Ark. Code Ann. § 4-75-101 (non-compete agreements must be limited in time and scope); § 542.43(3), Fla. Stat. (non-competes must be reasonable in duration).

[42] *See, e.g.*, Cal. Bus. & Prof. Code § 16600; Minn. Stat. Ann. § 181.988; N.D.C.C. § 9-08-06.

agreements in their entirety with very narrow exceptions that would not be applicable to student-athletes.[43]

In states that have not imposed near-total bans of non-compete agreements, a duration of less than one year is generally enforceable under both statutory and common law frameworks.[44] However, because student-athletes only have, at most, a four-year career, a one-year restriction may be more burdensome for a student-athlete than for a typical employee.

Statutes and common law frameworks generally limit geographic restrictions to either the scope of the employer's business[45] or to the geographic regions in which the employee provides services.[46] Because attendance at college is of limited duration and student-athletes generally do not establish more permanent ties (like purchasing a home), they do not face the same mobility restrictions as typical employees, and an effective non-compete agreement would likely need to be nationwide. In seeking to enforce a non-compete, universities would likely argue that they do 'business' nationwide as their athletes travel across the country to compete against other universities. Given the unique circumstances regarding the lack of mobility restrictions for student-athletes and the national market for college athletics, it is possible that courts may interpret a nationwide restriction more favorably than for employees generally. In any event, whether a university can enforce through litigation a student-athlete's breach of a non-compete provision in an NIL agreement will turn on whether the provision conforms to the limitations imposed by the applicable state law.

2. Non-Disclosure Provisions

NIL contracts often contain non-disclosure provisions that bar student-athletes from disclosing certain information obtained as a result of their participation on the team. Most often, NIL agreements require student-athletes not to disclose the terms of their NIL

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[43] Cal. Bus. & Prof. Code § 16600; Minn. Stat. Ann. § 181.988; N.D.C.C. § 9-08-06; *see also* Wy. Stat. Ann. § 1-23-108 (note that while non-competes are void in Wyoming, employers may, to a certain extent, recuperate costs to relocate, educate, and train employees).

[44] *See, e.g.*, M.G.L. c. 149, § 24L(b)(iv) (maximum duration for a non-compete in Massachusetts is generally one year); Idaho Code § 44-2704(1)-(2) (eighteen-month duration is presumed reasonable); Ark. Code Ann. § 4-75-101(d) (two years is presumed to be a reasonable duration); *Licocci v. Cardinal Assocs., Inc.*, 445 N.E.2d 556, 558 (Ind. 1983) (enforcing non-compete agreement lasting one year); *Weber v. Tillman*, 913 P.2d 84, 90 (Kan. 1996) (enforcing non-compete agreement lasting two years); *Scott v. General Iron & Welding Co.*, 368 A.2d 111, 116 (Conn. 1976) (enforcing non-compete agreement lasting five years); *Weichert Co. of Pennsylvania v. Young*, No. 2223-VCL, 2007 WL 4372823, at *3 (Del. Ch. Dec. 7, 2007) (enforcing non-compete agreement lasting two years); *but see Elite Cleaning Co. v. Capel*, No. Civ.A. 690–N, 2006 WL 1565161, at *1-2, *8 (Del. Ch. June 2, 2006) (two-year non-compete unreasonable against a janitor who performed basic cleaning duties).

[45] *See, e.g.*, Ala. Code § 8-1-190 (limiting geographic restrictions to where the employer does business); § 542.43(3), Fla. Stat (same); *Cent. Adjustment Bureau, Inc. v. Ingram Assocs., Inc.*, 622 S.W.2d 681, 686 (Ky. Ct. App. 1981) (Kentucky court enforcing a nationwide non-compete where the employer's business was also national in scope).

[46] *See, e.g.*, M.G.L. c. 149, § 24L(b)(v); *Quaker Chem. Corp. v. Varga*, 509 F. Supp. 2d 469, 476-77 (E.D. Pa. 2007).

contract with third parties.[47] These provisions are broad and sometimes even extend to third parties, such as players' agents or players.[48] The effect of this type of provision is to prevent the student-athlete from negotiating with other schools and collectives using the existing NIL terms as leverage.[49]

Further, there is support for the argument that protections against disclosures of team strategies, such as playbooks and scouting materials, in the professional context.[50] Universities should consider including explicit provisions protecting against such disclosures in their NIL contracts. In addition to offering direct protection against the disclosure of competitively sensitive information to the school's competitors, this type of provision can also bolster the reasonableness and enforceability of any separate restrictions on transfer by establishing an acknowledgement by the student-athlete as to the confidentiality of certain information learned through their team participation, and providing a rationale for the limitations on their ability to transfer as part of the NIL agreement in the event of a breach.[51] In one example, student-athletes that are parties to NIL contracts with teams in the Atlantic Coast Conference could lose up to 50% of their payment from an NIL deal if a third party breaches the confidentiality provisions of the NIL agreement.[52]

Proving a breach of confidentiality can be extremely difficult because the disclosure of confidential information must be connected to a specific economic loss. In addition, courts sometimes view future losses as speculative damages. However, types of recoverable damages in this context may include lost business opportunities, loss of customers or contracts, or unjust enrichment or profits obtained by the student-athlete or athletic department that the athlete transferred to.

3. Liquidated Damages and Clawback Provisions

Many NIL contracts also contain liquidated damages provisions. These provisions are effectively an 'exit fee' if the player chooses to transfer before the contract term is up, and schools are now using these provisions as an attempt to force players to buy their way out of a contract to transfer to another school. Similarly, payment clawback provisions in an NIL contract typically require the student-athlete to pay back some or all of the payments they

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[47] Joe Cox, *ACC team's NIL provision could punish athletes for others' disclosure of deals*, Sports Illustrated (Dec. 26, 2025), https://www.si.com/fannation/college/cfb-hq/nil/acc-team-s-nil-provision-could-punish-athletes-for-others-disclosure-of-deals.

[48] *Id.*

[49] *Id.*

[50] *See New York Knicks sue Toronto Raptors for stealing scouting reports and trade secrets*, NBC (Aug. 22, 2023), https://www.nbcnews.com/news/sports/new-york-knicks-sue-toronto-raptors-stealing-scouting-reports-trade-se-rcna101139.

[51] Joe Cox, *ACC team's NIL provision could punish athletes for others' disclosure of deals*, Sports Illustrated (Dec. 26, 2025), https://www.si.com/fannation/college/cfb-hq/nil/acc-team-s-nil-provision-could-punish-athletes-for-others-disclosure-of-deals.

[52] *Id.*

have already received, typically between 50-100%, if certain conditions are met, including when they have transferred schools.[53] Though they function similarly, clawback provisions are different from liquidated damages, because a clawback provision requires repayment of an amount received by the student-athlete, whereas liquidated damages require the athlete to pay a pre-determined amount that does not vary.[54] Challenges to enforcement of these types of provisions include ambiguous contract language about what triggers repayment or arguments that the provision is unenforceable. Parties seeking to enforce a liquidated damages provision may also run into challenges regarding its enforceability where the amount appears excessive relative to the actual harm suffered, or if the damages could not have been reasonably anticipated.

4. Recent NIL Contract Litigation Against Student-Athletes

An NIL contract between a university, university affiliate, or third-party collective on the one hand and a student-athlete on the other carries with it significant litigation risk given the loosened restrictions on both NIL offerings and student-athlete transfers. Student-athletes under NIL contract may be confronted with more lucrative NIL opportunities, particularly after a season of personal performance exceeding public expectations. Their playing time or utilization on their current team may not meet their expectations or previous commitments by the program. Team and coach chemistry, school environment, and other 'quality-of-life' issues may also play a factor.

Moreover, litigation risk arising from contractual breaches may also extend to the third parties that may reap the benefits of the students' transfer – i.e., the school to which the student-athlete is transferring and any third-party NIL collective that contracts with the student as a result. This section discusses the contractual provisions that could give rise to contractual litigation risk both with respect to the parties to the contract or third-party beneficiaries thereto, and to the obstacles that may arise which could impede enforcement of those provisions in court.

In a recent case involving the University of Georgia, a former Georgia football player, Damon Wilson, decided to transfer in January 2025 to the University of Missouri after he signed a 14-month NIL contract with the University of Georgia.[55] Following his transfer announcement, the University of Georgia sued Wilson, claiming he owed the athletic department $390,000 in liquidated damages. Wilson brought a counterclaim, arguing that the school was weaponizing the clause to punish him for entering the transfer portal and that the clause is unenforceable. Because liquidated damages must be tied to actual

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[53] *Transfer Portal Clause Risks: What Every Athlete Must Know Before Signing*, NIL Contracts IQ, https://nilcontractsiq.com/guide/transfer-clause-risks.html (last updated January 2026).

[54] *See id.*

[55] Ryan Luetkemeyer, *Missouri DE sues University of Georgia over transfer portal interference*, Courthouse News Service (Dec. 23, 2025) https://www.courthousenews.com/missouri-de-sues-university-of-georgia-over-transfer-portal-interference/.

damages, it remains to be seen whether schools can successfully use these clauses to enforce their NIL agreements. On June 11, 2026, the court ordered mediation.[56]

In another example, Duke University sued its quarterback Darian Mensah to prevent him from transferring to another university.[57] Mensah initially signed a $4 million NIL contract with Duke that was set to end on December 31, 2026.[58] Just days after Mensah announced his intention to transfer to the University of Miami, Duke filed suit in North Carolina state court to enforce the terms of their NIL agreement. Duke sought a temporary restraining order (TRO) to block Mensah's request to enter the transfer portal.[59] On January 20, 2026, the judge granted in part and denied in part the request for a TRO, prohibiting Mensah from enrolling or competing at another school pending resolution of the parties' dispute in arbitration but permitting Mensah to enter the transfer portal.[60] Even though both cases involve a claim for breach of contract, the suit against Mensah differs from the Wilson suit in terms of the remedy sought. The University of Georgia is seeking liquidated damages, whereas Duke is purely seeking to enforce the terms of its NIL agreement with Mensah, which would prevent him from playing for another university through December 31, 2026.

The Mensah case ended in a settlement, with Mensah paying a significant buyout to Duke to exit the remaining term of his contract.[61] However, the settlement leaves legal questions unresolved. If Mensah were considered an employee who signed a multiyear contract, the university might have had stronger grounds to block the transfer if the provision were considered a valid non-compete clause. However, a noncompete clause implicates an athlete's decision to independently use his publicity rights. Although the *House* settlement changed the circumstances of athletes' compensation, courts have not ruled that athletes are considered legal employees.[62] The Mensah settlement raises questions about whether universities are effectively 'employing' athletes using NIL agreements and enforcing them as effective non-competes while avoiding the legal obligations owed to employees, such as collective bargaining rights and negotiating power.

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[56] Order for Mediation, *University of Georgia Athletic Ass'n, Inc. v. Damon Wilson*, No. 25-cv-0569 (Sup. Ct. Ga. June 11, 2026), Dkt. No. 14.

[57] Max Olson, *Darian Mensah, Duke settle; QB commits to Miami*, ESPN (Jan. 27, 2026), https://www.espn.com/college-football/story/_/id/47743820/darian-mensah-duke-settle-dispute-qb-eyes-miami-transfer.

[58] *Id.*

[59] Pl.'s Mot. for TRO and Preliminary Injunction, *Duke Univ. v. Mensah*, No. 26CV000605-310 (N.C. Super. Ct. Durham Cnty. Jan. 20, 2026); Mark Schlabach and Pete Thamel, *Duke's Mensah can enter portal, can't sign until injunction ruling*, ESPN (Jan. 21, 2026), https://www.espn.com/college-football/story/_/id/47683265/duke-qb-mensah-enter-portal-sign-judge-rules.

[60] Temporary Restraining Order at 6-7, *Duke Univ. v. Mensah*, No. 26CV000605-310 (N.C. Super. Ct. Durham Cnty. Jan. 21, 2026).

[61] Max Olson, *Darien Mensah, Duke settle; QB commits to Miami*, ESPN (Jan. 27, 2026) https://www.espn.com/college-football/story/_/id/47743820/darian-mensah-duke-settle-dispute-qb-eyes-miami-transfer.

[62] *See supra* I.B-C; II.A.

5. Third-Party Litigation Risks and Opportunities Arising from NIL Contract Breaches

Litigation risk arising from NIL contracts is not limited to the school seeking to enforce the contract with a student-athlete, as schools to which a student transfers and other third parties alleged to have had involvement in the student-athlete's decision to breach the contract through transfer also face potential third-party liability. Many states also recognize third-party liability for interference with a non-compete or similar agreement. A former employer can seek damages against an employer that has recently recruited one or more employees under a number of different tort and statutory theories. For example, third parties can be liable under the tort of intentional interference with contractual relations where: (1) a valid contract exists; (2) the third party knew about the contract; (3) the third party intentionally interfered with the contract; (4) the interference caused a breach of contract or made performance more difficult; and (5) the parties to the contract suffer damages as a result.[63] Other tort theories, such as aiding and abetting a breach of contract or unlawful conversion, may also be available.[64] A cause of action against third parties that facilitate a contractual breach may also lie under state unfair competition and unfair trade statutes.[65]

In addition, despite the availability of a potentially meritorious cause of action a university may have against a transferring student-athlete in breach of his NIL contract, there may be practical limitations to bringing such an action against a student-athlete. In addition to uncertainty of recovery, there may also be reputational and public-relations issues that may arise from a school seeking to recover large sums against a young student of possibly limited means and requiring them to incur attorney fees in the process.

The University of Wisconsin's (UW) recently filed lawsuit against the University of Miami (UM) for tortious interference[66] is an example of how third parties may face liability in this context. In this action, UW alleges that one of its football players, Xavier Lucas, had entered

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[63] *See, e.g.*, *United Lab'y, Inc. v. Kuykendall*, 322 N.C. 643, 663-65 (N.C. 1988) (third parties may be liable for tortious interference of contract and unfair trade practices where they induce an employee to violate a valid non-compete agreement).); Fla. Stat. § 542.45(2)(b) (enjoining third parties from engaging a covered employee during the employee's noncompete period).

[64] *See Bauer v. DILIB, Inc.*, 16 So. 3d 318, 320-21 (Fla. 4th DCA 2009) ("Even though section 542.335(1)(a) precludes a plaintiff from enforcing a restrictive covenant against a third party, a plaintiff still may enjoin a third party who aids and abets the violation of a restrictive covenant."); *USI Ins. Servs. of Fla. Inc. v. Pettineo*, 987 So. 2d 763, 767 (Fla. 4th DCA 2008) ("There is no doubt that a court can enjoin others who were not parties to the non-compete agreement….").

[65] *See United Lab'y, Inc. v. Kuykendall*, 322 N.C. 643, 663-65 (N.C. 1988) (third parties may be liable for tortious interference of contract and unfair trade practices where they induce an employee to violate a valid non-compete agreement).

[66] Complaint, *Bd. of Regents of the Univ. of Wis. Sys. v. Univ. of Miami*, No. 2025CV002039 (Wis. Cir. Ct. Dane Cnty. June 20, 2025); Dan Murphy, *Wisconsin sues Miami for tampering with football transfer*, ESPN (June 20, 2025), https://www.espn.com/college-football/story/_/id/45552578/wisconsin-sues-miami-tampering-football-transfer.

into a Memorandum of Understanding with UW for two-year exclusive NIL use,[67] with compensation contingent on the approval of the *House* settlement.[68] In addition, Lucas entered a contract with the UW's NIL Collective for compensation in the interim.[69] Instead of entering the NCAA's transfer portal, Lucas allegedly unenrolled from UW and enrolled at UM even though the deadline for transfer applications had passed.[70] However, the complaint does not assert any claims against Lucas; rather, it alleges that UM induced the violation of his NIL contracts, seeking damages and a declaratory judgment against UM.[71] In support of this claim, the complaint describes an in-person meeting among a UM coach, Lucas, and a prominent UM alumnus, during which a lucrative offer was made.[72] Should the court allow the case to move forward past the motion to dismiss stage, schools will need to consider the availability and risk of third-party liability for transferring student-athletes' contractual breaches, either as a means of 'deeper-pocketed' recovery for the school and/or collective that was counterparty to the contract, and as a risk for schools/collectives receiving the NIL-related benefits of the transfer.

B. Risk No. 2: Government Enforcement of Restrictions on Athlete Mobility

In addition to the legal limitations on private enforcement of non-compete and other restrictive NIL contract provisions, the use of non-compete and provisions that may be restrictive on student-athlete mobility could also be subject to government enforcement.

1. State Enforcement

States have been active in enforcing their non-compete laws. The Washington State Attorney General secured an agreement with a coffee chain to end the chain's use of non-compete agreements that barred baristas from seeking employment within a ten-mile radius of any of the chain's coffee shops.[73] The chain also had to pay a $50,000 fine.[74] The Illinois Attorney General settled a suit against Jimmy John's whereby the sandwich maker

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[67] Complaint at 23, *Bd. of Regents of the Univ. of Wis. Sys. v. Univ. of Miami*, No. 2025CV002039 (Wis. Cir. Ct. Dane Cnty. June 20, 2025); Dan Murphy, *Wisconsin sues Miami for tampering with football transfer*, ESPN (June 20, 2025), https://www.espn.com/college-football/story/_/id/45552578/wisconsin-sues-miami-tampering-football-transfer.

[68] Complaint at 4, *Bd. of Regents of the Univ. of Wis. Sys. v. Univ. of Miami*, No. 2025CV002039 (Wis. Cir. Ct. Dane Cnty. June 20, 2025).

[69] *Id.* 14, 19, 27, 29.

[70] *Id.* 46.

[71] *Id.*; Murphy, *supra* note 67

[72] Complaint, s*upra* note 68, at 47.

[73] *Attorney General Bob Ferguson stops King County coffee shop's practice requiring baristas to sign unfair non-compete agreements,* Washington State Office of the Attorney General (Oct. 29, 2019), https://www.atg.wa.gov/news/news-releases/attorney-general-bob-ferguson-stops-king-county-coffee-shop-s-practice-requiring.

[74] *Id.*

agreed not to enforce noncompete agreements with its employees.[75] Jimmy John's also agreed to pay $100,000 for programs to raise public awareness regarding so-called non-compete agreements.[76]

As states continue to pass legislation regulating non-compete agreements, state attorneys general will likely be more active in bringing enforcement actions against non-compete agreements. For example, DC announced three settlements totaling more than $150,000 following DC's ban on non-competes, which went into effect on October 1, 2022.[77] Universities should remain vigilant about changes to legislation around non-compete agreements as the landscape continues to evolve: state enforcers may view non-competes or their analogues in the NIL context as subject to these prohibitions, or to broader prohibitions under unfair competition statutes.

2. Federal Enforcement

Non-compete provisions have also been subject to increased scrutiny by government enforcers as potential violations of federal enforcement statutes. Under the Sherman Act, recent pronouncements by both the Antitrust Division and the FTC indicate that the use of non-competes could amount to unreasonable restraints on trade under Section 1 of the Sherman Act,[78] though neither agency has yet brought a Sherman Act enforcement action challenging a non-compete agreement.[79] Similarly, the FTC has made clear that non-compete provisions can also be violative of Section 5 of the FTC Act as unfair methods of

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[75] Daniel Wiessner, *Jimmy John's settles Illinois lawsuit over non-compete agreements*, Reuters (Dec. 7, 2016), https://www.reuters.com/article/world/jimmy-johns-settles-illinois-lawsuit-over-non-compete-agreements-idUSKBN13W2J9/.

[76] *Id.*

[77] *Attorney General Schwalb Announces Three District Employers Must Pay More Than $150K for Violating DC's Ban on Non-compete Agreements*, Office of the Attorney General (Nov. 17, 2023), https://oag.dc.gov/release/attorney-general-schwalb-announces-three-district.

[78] Fed. Trade Comm'n, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act*, Comm'n File No. P221202 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf; *FTC and DOJ Jointly Issue Antitrust Guidelines on Business Practices that Impact Workers*, Fed. Trade Comm'n (Jan. 16, 2025), https://www.ftc.gov/news-events/news/press-releases/2025/01/ftc-doj-jointly-issue-antitrust-guidelines-business-practices-impact-workers.

[79] Whether enforcement against non-competes under the Sherman Act could be sustainable is far from clear. Proving Sherman Act violations in the NIL context, given the vertical nature of non-compete agreements, would require surviving a rule of reason analysis. *See Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 US 36, 57-59 (1977) (requiring a plaintiff challenging a vertical agreement to demonstrate that the defendant has market power); *Menasha Corp. v. News Am. Mktg. In-Store*, 354 F.3d 661, 663 (7th Cir. 2004). (a showing of market power generally will require a showing of more than 30% market share); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 US 2, 26-29 (1984) (overruled in part on other grounds). In the context of a non-compete agreement, assuming that every Division 1 School competes with every other Division 1 School in the country to 'purchase' the services of student-athletes for each sport, a challenge to a non-compete agreement between a university and a student-athlete under the Sherman Act would have to demonstrate that the Division 1 School defendant has at least a 30% share of student-athletes in a particular sport. This is highly unlikely.

competition.[80] Against this backdrop, the Biden FTC instituted rulemaking to ban nearly all non-compete agreements nationwide as violations of Section 5.[81, 82] Although the Trump Administration dismissed the FTC's appeal of the ruling invalidating the Biden-era rule banning most non-competes,[83] the current FTC Chairman has emphasized that the FTC remains committed to challenging unlawful non-compete agreements.[84] Further, it has also used its Section 5 authority to secure proposed consent orders requiring companies to stop enforcing its non-compete agreements.[85] While the extent to which the federal government will seek to enforce against non-compete provisions in NIL contracts is unclear, it does pose a risk that schools and third-party collectives should not ignore.

C. Risk No. 3: No-Poach Agreements Among Competitor Schools

In addition to the legal risks associated with agreements between schools and student-athletes that restrict the student-athlete's ability to transfer schools and seek more lucrative NIL agreements, there is an added compliance/enforcement risk that schools must now confront: the risk that its athletics department leadership or coaching staff may enter into agreements with *competitor schools* to refrain from recruiting each other's athletes. Such agreements would likely run afoul of the Sherman Act and state-law analogs as *per se* offenses of antitrust law.

No-poach agreements are agreements between horizontal competitors in a labor market not to hire each other's employees. They are typically not committed to a formal writing but instead are either informal oral or written (typically by email or text) agreements, and are usually veiled and implicit, akin to 'gentlemen's agreements.' No-poach agreements are different from non-compete agreements and may also give rise to liability for universities as

[80] Fed. Trade Comm'n, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act*, Comm'n File No. P221202 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf ("Section 5 was designed to extend beyond the reach of the antitrust laws.").

[81] 16 C.F.R. § 910 (2024); *FTC Announces Rule Banning Noncompetes*, Fed. Trade Comm'n. (Apr. 23, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes; Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910); *FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, Fed. Trade Comm'n. (Jan. 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition.

[82] *Ryan, LLC v. FTC*, 746 F. Supp. 3d 369, 385, 388-90 (N.D. Tex. 2024).

[83] *Federal Trade Commission Files to Accede to Vacatur of Non-Compete Clause Rule*, Fed. Trade Comm'n (Sept. 5, 2025), https://www.ftc.gov/news-events/news/press-releases/2025/09/federal-trade-commission-files-accede-vacatur-non-compete-clause-rule.

[84] *FTC Chairman Ferguson Issues Noncompete Warning Letters to Healthcare Employers and Staffing Companies*, Fed. Trade Comm'n (Sept. 10, 2025), https://www.ftc.gov/news-events/news/press-releases/2025/09/ftc-chairman-ferguson-issues-noncompete-warning-letters-healthcare-employers-staffing-companies.

[85] *FTC Takes Action Against Noncompete Agreements, Securing Protections for Workers*, Fed. Trade Comm'n (Apr. 15, 2026), https://www.ftc.gov/news-events/news/press-releases/2026/04/ftc-takes-action-against-noncompete-agreements-securing-protections-workers; *FTC Takes Action to Protect Workers from Noncompete Agreements*, Fed. Trade Comm'n (Sept. 4, 2025), https://www.ftc.gov/news-events/news/press-releases/2025/09/ftc-takes-action-protect-workers-noncompete-agreements.

they involve agreements between *horizontal* competitors – employers, and, in this case, universities – not to hire each other's workers, or in this case, student-athletes. Non-compete agreements, on the other hand, are *vertical* agreements between a buyer of labor (the university) and the seller of labor (the student-athlete).

No-poach agreements have long been the subject of private antitrust litigation, but in recent years have become a target for civil and criminal prosecution since the Department of Justice and the FTC issued guidance in 2016 announcing their intent to treat naked no-poach agreements as *per se* offenses (i.e., offenses that do not require any proof of anti-competitive effect) subject to criminal prosecution.[86] Since then, there have been a number of federal civil enforcement and criminal prosecutions against companies and individuals that entered into no-poach agreements with other companies with whom they compete for employees.[87] Similar prosecutions have occurred at the state level.[88] And, although the Government has had mixed success in obtaining convictions in these prosecutions,[89] courts hearing these cases have endorsed DOJ's view of no-poach agreements as *per se* offenses and have now issued precedential decisions to that effect.[90] Regardless, corporate and individual defendants in these cases, as well as those subject to investigations into alleged no-poach agreements, have spent millions of dollars in defense costs as a result of these investigations. There is no sign of these prosecutorial efforts abating.

[86] *FTC & DOJ Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation*, Fed. Trade Comm'n (Oct. 20, 2016), https://www.ftc.gov/news-events/news/press-releases/2016/10/ftc-doj-release-guidance-human-resource-professionals-how-antitrust-law-applies-employee-hiring.

[87] *See, e.g.*, *United States v. DaVita Inc.*, No. 1:21-cr-00229-RBJ, 2022 US Dist. LEXIS 16188, at *6 (D. Colo. Jan. 28, 2022) (criminal indictment for no poach agreements) (including Web Tac).

[88] *Report: Ferguson's Initiative Ends No-Poach Practices Nationally at 237 Corporate Franchise Chains*, Wash. State Off. of the Att'y Gen. (June 16, 2020), https://www.atg.wa.gov/news/news-releases/ag-report-ferguson-s-initiative-ends-no-poach-practices-nationally-237-corporate; Jonathan Stempel, *Big title insurer settles New York attorney general 'no-poach' claims*, Reuters (Mar. 29, 2023), https://www.reuters.com/legal/big-title-insurer-settles-new-york-attorney-general-no-poach-claims-2023-03-29/; *Attorney General Bonta Sues National Cleaning and Sanitation Company for "No Poach" Agreements*, Cal. Dep't of Just. (Apr. 30, 2025), https://oag.ca.gov/news/press-releases/attorney-general-bonta-sues-national-cleaning-and-sanitation-company-%E2%80%9Cno-poach%E2%80%9D.

[89] *See DaVita Inc. and Former CEO Indicted in Ongoing Investigation of Labor Market Collusion in Health Care Industry*, US Dep't of Just., https://www.justice.gov/archives/opa/pr/davita-inc-and-former-ceo-indicted-ongoing-investigation-labor-market-collusion-health-care (last updated July 15, 2021) (noting acquittal); *see also* Perry A. Lange et al., *The State of "No-Poach" Prosecution: Is It Just Like Market Allocation After All?*, 38 Antitrust 12, 12 (2024) ("DOJ argued that no-poach agreements are effectively per se unreasonable market allocation agreements among competitors—a theory that repeatedly survived motions to dismiss. Despite success at the pleading stage, DOJ has failed to convince judges and jurors on the facts, and it has lost each of the four cases that were brought to trial.").

[90] *See In re Outpatient Med. Ctr. Emp. Antitrust Litig.*, 630 F. Supp. 3d 968, 988 (N.D. Ill. 2022); *United States v. DaVita Inc.*, No. 21-cr-00229-RBJ, 2022 WL 266759, at *8-10 (D. Colo. Jan. 28, 2022); *see also* Perry A. Lange et al., *The State of "No-Poach" Prosecution: Is It Just Like Market Allocation After All?*, 38 Antitrust 12, 12 (2024) ("DOJ argued that no-poach agreements are effectively per se unreasonable market allocation agreements among competitors—a theory that repeatedly survived motions to dismiss.").

Although student-athletes are not legally recognized as employees (at least not yet), there is a significant risk that any agreement between schools not to recruit each other's athletes with more lucrative NIL offers would be viewed as a no-poach agreement in a different form. While perhaps not a labor market, there is certainly an NIL rights market for any given student-athlete, and those NIL rights travel with the student-athlete to whichever school he/she attends. Athletic departments of competing schools may be tempted to seek to protect their star athletes and roster continuity and team cohesion through a mutual agreement not to poach each other's athletes, rather than having to spend the money to either compete for athletic talent elsewhere or retain its own athletic talent. Should competing schools do this, they are effectively conspiring to restrict that athlete's ability to obtain the best value for their NIL. In that regard, any such agreement would be virtually indistinguishable from the no-poach agreements that have been and continue to be subject to criminal prosecution.

While criminal penalties for violations of state antitrust law differ across states, the Sherman Act imposes on violators a maximum of $100 million for corporations and $1 million for individuals; violators could also be subject to up to ten years of imprisonment.[91] Criminal charges can also lead to other collateral consequences for schools, including exposure under the False Claims Act based on certification of compliance with all applicable laws; disqualification from receiving federal grants; and suspension or debarment from federal grant programs.

IV. <u>Risk-Mitigating Recommendations for Universities, Third-Party NIL Collectives, and College Athletes</u>

The new post-*House* world of NIL agreements has thrown universities into an uncharted frontier of litigation and enforcement risk. On the one hand, schools and NIL collectives entering into NIL contracts with student-athletes are at continual risk of students breaching that contract, often with the involvement of another school and NIL collective, in pursuit of a more lucrative contract elsewhere, and therefore must tailor the terms of their NIL contracts to both minimize the likelihood of breach and maximize the likelihood of success of enforcement through litigation. Schools entering into NIL contracts with student-athletes from the transfer portal take on the added risk of liability to the student-athletes' original NIL counterparties for any potential involvement they may have had in interfering or aiding/abetting the student-athletes' contractual breach. And in either of these contexts, schools and collectives entering into NIL contracts with student-athletes must avoid arrangements that could be subject to government enforcement, either through use of illegal non-compete provisions in their NIL contracts or illegal no-poach agreements.

To address these new risks, schools and third-party collectives should consider the following risk-mitigating measures:

[91] 15 U.S.C. § 1. Note that the maximum fine may be increased to twice the amount the conspirators gained from the illegal acts or twice the money lost by the victims of the crime, if either of those amounts is over $100 million. *The Antitrust Laws*, Federal Trade Commission, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited July 10, 2026).

Understand The Applicable Law Governing Your NIL Contracts. Although the default law governing the contract will likely be the law of the state where a school is located, schools can negotiate choice-of-law provisions that permit stronger enforcement of restrictive contractual provisions and maximize their ability to impose liability on third parties for the student's contractual breach. At the same time, regardless of the contracts' choice-of-law provision, schools should also be aware of any state laws that permit government enforcement based on the domicile of the student-athlete and consider those laws' restrictions in its contract negotiations with the student. Consideration should also be given to the pros and cons of requiring any dispute resolution in federal court, state court, or through arbitration.

Offer Protections to Student-Athlete Recruits. Universities may consider making available a pool of independent counsel or licensed agents for the purpose of assisting students in NIL contract negotiation. This may instill student-athlete loyalty while also avoiding the appearance of uneven levels of sophistication and the risk of later claims of fraudulent inducement or unfair advantage. For NIL agreements involving transferring student-athletes, schools may consider including indemnification provisions covering certain damages, costs, and reasonable attorneys' fees arising from third-party claims related to the athlete's transfer or eligibility. Such protections can help mitigate litigation risk while providing greater certainty to both the institution and the student-athlete.

Centralize Legal Review of All NIL Contracts. Consider centralizing the legal review of all NIL agreements to promote consistency in contract terms, streamline negotiations, and reduce the need to repeatedly develop new forms and provisions. A centralized review process can also help ensure that NIL arrangements are structured in compliance with applicable CSC requirements, including fair market value standards, while reducing legal and regulatory risk.

Document All Communications with Student-Athletes During the Recruitment / Negotiation Process. Schools should maintain thorough documentation of communications with student-athletes throughout the recruitment and NIL negotiation process. Consistent recordkeeping can promote transparency, support compliance efforts, and provide an evidentiary record to help address potential disputes, regulatory inquiries, or allegations regarding representations made during recruitment or contract discussions.

Ensure Third-Party Compliance with Applicable Laws and NCAA Regulations. Schools should take steps to ensure that NIL collectives, sponsors, marketing representatives, and other counterparties comply with applicable laws and NCAA rules. This may include requiring contractual certifications of compliance, representations and warranties regarding regulatory adherence, and indemnification provisions to protect the institution and student-athletes from liabilities arising from a third party's noncompliance.

Maintain a Robust 'Anti-No-Poach Agreement' Compliance Program Covering All Parties Involved in Student-Athlete Recruitment. Schools should maintain a robust compliance program applicable to all individuals and entities involved in student-athlete recruitment to avoid appearing to, or actually entering into, an agreement with another school not to poach each other's student-athletes. Such a program should include regular training, clear policies and procedures governing interactions with competing athletic programs, accessible reporting mechanisms such as a compliance hotline, and strong anti-retaliation protections. These measures are particularly important in light of increasing antitrust enforcement and the availability of whistleblower programs that incentivize reporting of potential violations.

V. Conclusion

The new post-*House* ecosystem in which schools must recruit highly sought-after student-athletes through NIL contracts present novel and unique litigation and enforcement risks against a legal backdrop that will continue to evolve for the foreseeable future. However, a comprehensive understanding of the applicable rules, coordination across school departments and between schools and third-party collectives, and a robust compliance program can go far in minimizing these risks, permitting schools and collectives to achieve success in recruitment and NIL rights acquisition while minimizing the threats of private litigation and government, NCAA, and CSC enforcement.