

NFTS AND NILS: 4 CONSIDERATIONS FOR ATHLETIC DEPARTMENTS AS NEW OPPORTUNITIES FOR ATHLETES EXPLODE

Insights
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Name, image, and likeness (NIL) legislation for college athletes has changed the landscape for college athletic departments and conferences alike, allowing student-athletes to receive compensation on their own personal brand. Adding to the host of new and unique compliance obligations is the meteoric rise of non-fungible tokens (NFTs) as a popular new way for student-athletes to connect with their fans. The popularity of NFTs will inevitably result in athletic departments being required to assist your student-athletes as they navigate this new world – while creating opportunities to connect with your fans and alumni. What are the four key considerations you need to understand as you chart your course down this new path?

What are NFTs?

For the uninitiated, it's helpful to first examine what we're dealing with here. NFTs are unique digital assets recorded onto a blockchain proving that you are the sole owner of that particular item. Their unique aspect is what makes them "non-fungible" as opposed to something like the U.S. dollar or Bitcoin, which is fungible. They derive a large portion of their value from scarcity, although other factors (such as the popularity of the subject, the creator, the historical significance of the moment being captured, or other benefits provided such as exclusive access to the athlete or specific events) could also increase the NFT's value.

NFTs are already impacting professional sports in a variety of ways. For example, NBA TopShot creates digital collectible "moments" at various levels of scarcity that are

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recorded on the blockchain as NFTs. Similarly, athletes such as Steph Curry are creating unique sets of NFTs to capture historic moments such as when he broke the NBA's all-time three-pointer record, a Cristiano Ronaldo NFT selling for \$290,000, and the legendary Michael Jordan launching his own NFT collection.

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How will NFTs impact NIL?

NFTs will likely be one of the most convenient ways for college athletes to monetize their NIL and to connect with their fans. Several prominent college football players have already launched NFT collections. Companies such as Draftly and OpenLocker are creating platforms for college athletes to engage with their fans through NFTs (and reap the potential monetary rewards).

Quite simply, NFTs have created new opportunities for student-athletes to monetize their NIL as they will be able to "mint" (the process of creating an NFT on the blockchain) and sell their digital assets as an extra revenue stream without the need for negotiating a sponsorship deal.

4 NIL/NFT Issues Athletic Departments Should Consider

However, new and uncharted opportunities also raise new issues to manage. Below are four issues athletic departments should be prepared to evaluate as more student-athletes seek to capitalize on the potential benefits provided by NFTs.

1. NFTs can serve as an additional and long-term source of revenue

Without the need to negotiate a contract or attract the attention of sponsors, student-athletes can mint their own NFTs and have complete control over the revenue it generates. However, unlike selling physical merchandise, NFTs do not require a large amount of capital to create. For example, a student-athlete could create an NFT of their autograph and only issue a finite number. Over time, if a student-athlete becomes more popular, the value of the digital autograph will increase due to the scarcity of the NFT.

Each time an NFT is sold, the original minter, or in this case the student athlete, would receive a portion of the sale. Due to the ease of creating NFTs and their long-term

potential, athletic departments should educate their student-athletes regarding NFTs and their long-term earning potential.

2. NFTs can enhance a student-athletes brand

Student-athletes can develop a personal fanbase that collects their digital creations. If a student-athlete makes a great play that's a viral sensation, fans can buy a piece of history by purchasing the NFT that captures the play. In turn, the NFTs can assist student-athletes in attracting additional sponsors.

There are endless possibilities for student-athletes to interact with their fans through NFTs. For example, student-athletes could sell fan experiences through the purchase of an NFT. This of course will create new compliance obligations and concerns for athletic departments.

Athletic departments should carefully review every contract related to an NFT to ensure that state NIL laws are not violated and that any appearances by the student-athlete will not impact their educational and athletic obligations at the university.

3. New opportunities for athletic departments and conferences

Some conferences are already partnering with NFT experts to assist their student-athletes. One of the nation's largest athletic conferences has announced a new licensing partnership with blockchain technology company Recur and artificial intelligence (AI) specialist Veritone to produce the NCAA's first ever NFTs. Athletic departments and conferences can follow this lead by partnering with NFT experts to streamline the NFT process for their student-athletes.

Additionally, athletic departments and conferences can monetize fan experiences for their fans. For example, every season ticket holder can receive an NFT of a virtual ticket commemorating every game that they have attended.

Athletic departments and conferences can also partner with student-athletes to assist them with monetizing

custom made NFTs with the university's logo in which the student-athletes are featured.

4. Athletic departments and conferences should be mindful of unique compliance obligations.

There are some open questions athletic departments and conferences need to keep in mind before integrating NFTs into their NIL initiatives. To begin, it's uncertain what law applies to NFTs and how to classify them – whether as commodities, collectibles, cryptocurrency, or investment contracts and, accordingly, securities. The commonly applied Howey test (i.e., a test created by the U.S. Supreme Court for determining whether certain transactions qualify as an “investment contract”) would consider NFTs a security if, due to the effects of a third party or promoter, there's monetary investment in a common enterprise with the expectation of profit.

While the use of an NFT to represent one's signature may not satisfy the Howey test, an NFT that benefits from cash flows from other NFTs, or an NFT that's been fractionalized such that it or its profits are sold in parts, certainly could. On a related note, if an NFT is not resold through the same platform, royalty payments may cease to the original owner. Since U.S. law does not protect royalty resales relating to creative works, creators could take a serious loss.

Another issue for consideration is that while buyers and sellers can negotiate what rights transfer along with an NFT – such as the ability of the recipient to modify, sell, or publicly display the token – purchasers who are unaware of their rights may improperly infringe on a student-athletes NIL. Additionally, an NFT is only as secure as the blockchain it lives on. If the consensus mechanism running the blockchain fails or is attacked, it could disrupt data storage, record keeping, and workflow.

Of course, athletic departments and conferences will still need to ensure that general NIL [compliance guidelines](#) are still in place. Compliance departments should designate and publicize the compliance employees who are responsible for managing NFTs. Athletic departments should ensure compliance department employees are trained on issues related to NIL contracts, NFTs and any applicable state laws.

The future of NFTs and NIL

While the law surrounding NFTs may still be unclear, NFTs are unmistakably transforming the future of sports memorabilia. We'll continue to monitor developments in this area, so make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information. If you have any questions, please contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our [Cryptocurrency and Blockchain Taskforce](#) or [Sports Industry Group](#).