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## Bill Analysis

**Version:** As Introduced

**Primary Sponsors:** Reps. Mathews and Edwards

Chris Edwards, Attorney

### SUMMARY

- Authorizes an institution of higher education (a state institution of higher education or a private college) to compensate a student-athlete for use of the student-athlete's name, image, or likeness (NIL).
- Specifies that a student-athlete is not an employee because the institution compensates the student-athlete for use of the student-athlete's NIL.
- Prohibits a student-athlete from using specified property belonging to an institution to further opportunities for the student-athlete to earn NIL compensation unless authorized by the institution or college.
- Authorizes an institution to provide money, resources, or other benefits to a supporting foundation to incentivize it to facilitate opportunities for student-athletes to earn NIL compensation.
- Prohibits an institution, athletic association, conference, or other group or organization with authority over intercollegiate athletics from taking specified actions regarding a student-athlete who earns, or obtains representation from an athlete agent or attorney in relation to earning, NIL compensation.
- Makes any contract or proposed contract providing a student-athlete with NIL compensation that is disclosed to an institution as required under continuing law confidential and not a public record for purposes of the Public Records Law.
- Authorizes student-athletes, institutions, and foundations to sue for violations of the bill and provides immunity to institutions and foundations and their employees for damages resulting from a student-athlete's inability to earn NIL compensation.

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## DETAILED ANALYSIS

### Collegiate Student Athlete Law

The bill revises the Collegiate Student Athlete Law<sup>1</sup> that governs compensation to intercollegiate athletes for use of their name, image, or likeness (NIL). It makes changes throughout the law to refer to an intercollegiate athlete as a “student-athlete.” A student-athlete is an individual enrolled at an institution of higher education (a state institution of higher education or private college) who participates in intercollegiate athletics for that institution.<sup>2</sup>

### Student-athlete compensation by institutions or colleges

The bill authorizes an institution to compensate a student-athlete for use of the student-athlete’s NIL. The institution, however, cannot compensate the student-athlete using any fees paid to the institution by or on behalf of students attending that institution. The bill eliminates the prohibition against any institution or athletic authority (an athletic association, conference, or other group or organization with authority over intercollegiate athletics) compensating a prospective student-athlete in relation to the prospective student-athlete’s NIL.<sup>3</sup>

Each state institution of higher education board of trustees and the board of trustees or other governing entity of each private college that participates in intercollegiate athletics must adopt policies and procedures governing the institution’s or college’s compensation of a student-athlete for the use of the student-athlete’s NIL that are consistent with the bill. Each institution or college may enforce the policies or procedures.<sup>4</sup>

Such an institution also may provide money, assets, resources, opportunities, services, or other benefits to a supporting foundation to incentivize it to facilitate opportunities for a student athlete to earn compensation for use of the student-athlete’s NIL (NIL compensation). Under the bill, a supporting foundation is an organization whose primary purpose is to facilitate opportunities for a student-athlete to earn NIL compensation.<sup>5</sup>

### Institutional prohibitions

The bill modifies an existing prohibition for institutions. Currently, an institution cannot uphold any rule, requirement, standard, or other limitation that prevents a student of that institution from fully participating in intercollegiate athletics because the student earns NIL compensation. The bill also prohibits the institution from doing so because a student obtains

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<sup>1</sup> R.C. Chapter 3376.

<sup>2</sup> R.C. 3376.01, 3376.03, 3376.04, 3376.05, 3376.06, and 3376.07.

<sup>3</sup> R.C. 3376.04 and 3376.09.

<sup>4</sup> R.C. 3376.09.

<sup>5</sup> R.C. 3376.01 and 3376.09.

professional representation from an athlete agent or attorney in relation to contracts or legal matters regarding opportunities to earn NIL compensation.<sup>6</sup>

## **Athletic authority prohibitions**

The bill also modifies a prohibition for athletic authorities. Currently, an athletic authority cannot prevent an institution from participating in intercollegiate athletics because a student at that institution earns NIL compensation. The bill also prohibits the athletic authority from doing so because the student obtains professional representation from an athlete agent or attorney in relation to contracts or legal matters regarding opportunities to earn NIL compensation.

The bill also prohibits an athletic authority from doing any of the following:

- Considering a complaint, initiating an investigation, or taking any adverse action against an institution or foundation for engaging in any conduct authorized under the bill;
- Penalizing an institution or student-athlete, or preventing the institution or student-athlete from participating in intercollegiate athletics, because another individual or third-party entity whose purpose includes supporting or benefiting the institution or student-athlete violates a rule or regulation of the athletic authority that addresses NIL compensation;
- Preventing an institution from compensating a student-athlete for use of the student-athlete's NIL;
- Preventing an institution or foundation from identifying, creating, facilitating, negotiating, supporting, assisting with, engaging with, or otherwise enabling opportunities for a student-athlete to earn NIL compensation.

The bill modifies a prohibition that prevents an athletic authority from preventing an institution from fully participating in intercollegiate athletics because a student-athlete at that institution engages in certain NIL activities. Currently, an athletic authority cannot do so because a student-athlete uses the student-athlete's NIL or obtains professional representation in relation to contracts or legal matters regarding opportunities to earn NIL compensation. The bill instead prohibits an athletic authority from preventing an institution from becoming a member of the athletic authority or from participating in intercollegiate athletics sponsored by the athletic authority because a student-athlete engages in certain NIL activities. An athletic authority cannot do so because a student-athlete earns NIL compensation or obtains professional representation from an athlete agent or attorney.

The prohibitions that apply under current law to athletic authorities expressly apply to the National Collegiate Athletic Association (NCAA). The bill eliminates reference to the NCAA with respect to these prohibitions.<sup>7</sup>

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<sup>6</sup> R.C. 3376.02.

<sup>7</sup> R.C. 3376.03.

## Additional prohibitions

In addition to continuing law prohibitions, the bill prohibits any institution or athletic authority from doing either of the following:

- Preventing a student athlete from earning NIL compensation if the student-athlete earns that compensation in accordance with the bill;
- Entering into, renewing, or modifying any agreement that prohibits a student-athlete from earning NIL compensation while engaging in activities that do not relate to academic, athletic department, or official team activities.

The bill also modifies a prohibition concerning representation. Currently, an institution or athletic authority cannot prevent a student-athlete who resides in Ohio from obtaining professional representation in relation to contracts or legal matters regarding opportunities to earn NIL compensation. Under the bill, this prohibition applies with respect to any student-athlete, rather than only a student-athlete who resides in Ohio as under current law. It also applies with respect to obtaining professional representation from an athlete agent or attorney (appearing to limit those individuals to be the only individuals who may represent student-athletes; see “**Professional representation**,” below).

Under continuing law, an official team activity means all games, practices, exhibitions, scrimmages, team appearances, team photograph sessions, sports camps sponsored by an institution, and other team-organized activities, regardless of whether the activity takes place on or off campus, including individual photograph sessions and news media interviews.<sup>8</sup>

## Confidentiality of disclosed contracts

Under continuing law, a student-athlete who intends to enter into a contract providing the student-athlete with NIL compensation must disclose the proposed contract to the student-athlete’s institution for review. The bill makes any contract, proposed contract, or related documentation disclosed to an institution confidential and not a public record for purposes of the Public Records Law.<sup>9</sup>

## Student-athlete use of school property

Unless authorized by an institution, the bill prohibits a student-athlete, to further the student-athlete’s opportunities to earn NIL compensation, from using any of the following property that belongs to the institution:

- Facilities;
- Equipment;
- Apparel;

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<sup>8</sup> R.C. 3376.01, 3376.04, and 3376.06(A), repealed.

<sup>9</sup> R.C. 3376.06 and R.C. 149.43, not in the bill.

- Uniforms;
- Intellectual property, including logos, indicia, products protected by copyright, and registered or unregistered trademarks.<sup>10</sup>

## Scholarships

The bill addresses scholarship eligibility for a student who engages in certain NIL activities. Under continuing law, earning NIL compensation cannot affect a student's scholarship eligibility or renewal. Additionally, under the bill, a student's scholarship eligibility or renewal cannot be affected because the student obtains professional representation from an athlete agent or attorney in relation to contracts or legal matters regarding opportunities to earn NIL compensation.<sup>11</sup>

Under the bill, a benefit a student-athlete receives in accordance with an athletic authority's rules is not NIL compensation. Under continuing law, a scholarship from an institution similarly is not considered NIL compensation. The bill further specifies a scholarship covering some or all of the cost of attendance is not considered NIL compensation.

The bill modifies a prohibition regarding student-athlete scholarships. Continuing law prohibits an institution from revoking or reducing a student-athlete's scholarship because the student-athlete earns NIL compensation. The bill applies that prohibition to athletic authorities. It also prohibits institutions or athletic authorities from:

- Canceling or refusing to renew a scholarship for the same reason; and
- Taking any of those actions because a student-athlete obtains professional representation from an athlete agent or attorney in relation from contracts or legal matters regarding opportunities to earn NIL compensation.<sup>12</sup>

## Remedies and immunities

Under the bill, a student-athlete alleging an injury because an institution or athletic authority has violated the bill may sue in any court for injunctive relief. An institution or foundation alleging it has been subjected by an athletic authority to any actual or threatened complaint, investigation, penalty, or other adverse action for engaging in any conduct authorized under the bill may sue in any court for damages, injunctive relief, reasonable attorney's fees, or any other appropriate relief.

An institution or foundation is not liable for any damages that result from a student-athlete's inability to earn NIL compensation. An employee of an institution or foundation is not liable for any damages that result from a student-athlete's inability to earn NIL

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<sup>10</sup> R.C. 3376.10.

<sup>11</sup> R.C. 3376.02.

<sup>12</sup> R.C. 3376.05.

compensation because of a decision or action that routinely occurs in the course of intercollegiate athletics.<sup>13</sup>

## Student-athlete employment status

Under continuing law, a student-athlete is not an employee of an institution by participating in its athletic program. Nor, under the bill, is a student-athlete an employee because the institution compensates the student-athlete for use of the student-athlete's NIL.<sup>14</sup> Thus, under the bill, it appears that a student-athlete may not be an employee of an institution at least for state labor law purposes because the student-athlete receives NIL compensation from the institution.

It is not clear, however, whether that student-athlete would be considered an employee under federal labor law, including under the federal Fair Labor Standards Act<sup>15</sup> (FLSA) or the National Labor Relations Act<sup>16</sup> (NLRA). The FLSA prescribes minimum wage and overtime pay requirements for employees working for employers covered by it.<sup>17</sup> With respect to private colleges, the NLRA governs labor relations and collective bargaining between private employers and their employees.<sup>18</sup> In determining whether an employment relationship exists for FLSA purposes, the "economic reality" of the relationship between an individual and employer is examined.<sup>19</sup> Employment status determinations under the NLRA are made by examining, among other factors, whether the employer has the right to control an individual's work.<sup>20</sup>

## Professional representation

As noted above, continuing law and the bill include several prohibitions against certain actions being taken against a student-athlete or institution because a student-athlete obtains professional representation for NIL compensation purposes. Under the bill, these prohibitions apply with respect to professional representation obtained from an athlete agent or attorney.<sup>21</sup> An athlete agent includes anyone who attempts to market an athlete or an athlete's reputation, who attempts to obtain employment for an athlete as a professional athlete, or who seeks to enter into certain types of athletic contracts with an athlete. To act as an athlete agent, an

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<sup>13</sup> R.C. 3376.12.

<sup>14</sup> R.C. 3376.11 (renumbered from R.C. 3345.56).

<sup>15</sup> 29 United States Code (U.S.C.) 201, *et seq.*

<sup>16</sup> 29 U.S.C. 151, *et seq.*

<sup>17</sup> 29 U.S.C. 206 and 207.

<sup>18</sup> See, e.g., 29 U.S.C. 157 and 158.

<sup>19</sup> 29 U.S.C. 203, 29 Code of Federal Regulations 795.105, and see *Donovan v. Brandel*, 736 F.2d 1114 (6<sup>th</sup> Cir. 1984) and *Johnson v. NCAA*, 2024 U.S. App. LEXIS 16953, \*30 (3<sup>rd</sup> Cir. 2024).

<sup>20</sup> *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019), slip op. at 1 and see *Dartmouth College v. Service Employees International Union, Local 560*, NLRB Case No. 01-RC-325633, 2024 NLRB Reg. Dir. Dec. LEXIS 17 (February 5, 2024).

<sup>21</sup> R.C. 3376.02, 3376.03, 3376.04, and 3376.05.

individual must hold a certificate of registration or certificate of convenience issued under the Athlete Agent Law.<sup>22</sup>

Under continuing law, an attorney must hold a certificate of registration to act as an athlete agent, which, as noted above, includes attempting to “market an athlete or an athlete’s reputation.”<sup>23</sup> It is possible that engaging in NIL activities authorized under the bill constitutes marketing an athlete or an athlete’s reputation. Thus, it is not clear whether including attorney in the bill authorizes an attorney to engage in NIL activities without holding an athlete agent certificate of registration.

Additionally, an athlete agent, under continuing law, must include in a contract with an athlete a warning that the athlete may lose eligibility to compete in any amateur or intercollegiate athletics by signing the contract.<sup>24</sup> The bill does not address this requirement. As noted above, the bill prohibits taking certain actions against an athlete for obtaining representation, so it is not clear how this required contract provision would apply with respect to an athlete agent if the agent represents the athlete for NIL purposes only. It is possible the agent would have to include the contract provision even though it might not apply.

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## HISTORY

| Action     | Date     |
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| Introduced | 09-03-24 |

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<sup>22</sup> R.C. 3376.01 and R.C. 4771.01, 4771.06, 4771.08, and 4771.09, not in the bill.

<sup>23</sup> R.C. 4771.01, 4771.06, and see 4771.07, not in the bill.

<sup>24</sup> R.C. 4771.02, not in the bill.