

THE NCAA(UDIT): WHY COLLEGIATE ATHLETICS SHOULD OFFER TAX LITERACY AND PREPARATION RESOURCES IN LIGHT OF NIL TAX IMPLICATIONS

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“It’s like the more money we come across, the more problems we see.”¹

INTRODUCTION

Lawrence Taylor, an NFL Hall of Fame inductee, spent his career being a disruptive force as an outside linebacker. During his career, he earned record-breaking salaries for a defensive player and appeared in several films such as *The Waterboy* and *Any Given Sunday*.² Despite his success, in 2000, Taylor received 90 days of house arrest for filing a false tax return and accruing almost \$120,000 worth of tax debt.³

Although he is the all-time leader in hits in Major League Baseball, Pete Rose, in his infamy, was \$500,000 in debt to the IRS.⁴ In 1990, Rose pled guilty to filing false tax returns when he failed to report fees earned from personal appearances and autograph signings.⁵ He served a five-month prison sentence and later had to

¹ Notorious B.I.G., *Mo Money Mo Problems*, *on* *Life After Death* (Bad Boy/Arista 1997).

² *Top 10 High Profile Athletes Involved in Tax Scandals*, *The Sportster* (Aug. 7, 2014), <https://www.thesportster.com/entertainment/top-10-high-profile-athletes-involved-in-tax-scandals/#10-lawrence-taylor-nfl-hall-of-fame-linebacker—120-000-owed-to-the-irs>.

³ Scott Juceam, *Five Athletes Who Have Been in Tax Trouble*, *The Tax Defense Group*, <https://www.thetaxdefensegroup.com/five-athletes-who-have-been-in-tax-trouble/> (last visited Sept. 27, 2023).

⁴ *Id.*

⁵ *Top 10 High Profile Athletes Involved in Tax Scandals*, *The Sportster* (Aug. 7, 2014), <https://www.thesportster.com/entertainment/top-10-high-profile-athletes->

negotiate a settlement to avoid an additional prison sentence relating to his tax problems.⁶

Many other professional athletes have had run-ins with the IRS. Professional golfer, John Daly, received a federal income tax lien of \$1,050,733 for his 2007 and 2008 taxes.⁷ OJ Simpson owed \$515,000 to the IRS in 2013.⁸ A court sentenced former LA Lakers player Kermit Washington to six years in federal prison for filing a false tax return and aggravated identity theft.⁹ Professional athletes are sometimes faced with a reality that they were not prepared for: earning very high salaries during short career windows.

Some student-athletes are facing this same reality. Recent common law and statutory changes have made it possible for student-athletes to earn large sums of compensation for their name, image, and likeness (NIL).¹⁰ The average compensation for a Power 5 football player, for example, is \$10,000 to \$50,000 annually with about five players per roster making more than \$100,000 on average in addition to their scholarships.¹¹

With this compensation comes tax liability.¹² Student-athletes can be as young as seventeen; they are not legally able to vote, purchase alcohol or cigarettes, or register for selective service, yet the IRS expects them to be knowledgeable of the Internal Revenue Code (IRC) and pay complicated taxes on both the state and federal income tax levels.¹³ Further, some student-athletes are from lower-

involved-in-tax-scandals/#10-lawrence-taylor-nfl-hall-of-fame-linebacker—120-000-owed-to-the-irs.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Akhil Khatri, *Terrence Williams, Tony Allen and More: NBA Players Who Have Been Caught for Tax Evasion*, Sportskeeda (Nov. 8, 2022), <https://www.sportskeeda.com/basketball/nba-players-wrong-side-law>.

¹⁰ Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021).

¹¹ Ross Dellenger, *Inside the NIL Battle That Is Splintering the SEC: 'We're All Money Laundering'*, Sports Illustrated (May 30, 2023), <https://www.si.com/college/2023/05/30/sec-meetings-nil-athlete-employment-collectives-hot-topics>.

¹² U.S. Const. art. I, § 2, cl. 3; I.R.C. § 61(a).

¹³ Sam McQuillan, *NCAA Athletes Sure to Face Tax Hit as Endorsement Checks Arrive*, Bloomberg Tax (Oct. 31, 2019), <https://news.bloombergtax.com/daily-tax-report/naaa-opens-door-to-paying-athletes-for-fame-and-possible-tax-issues>; *Register for Selective Service (The Draft)*, USAGov (Apr. 4, 2023), <https://www.usa.gov/register>.

to-middle-income economic backgrounds and do not have family members who are knowledgeable about the tax system.

Considering these NIL tax implications, the NCAA and its member institutions should offer resources to better educate student-athletes of their tax obligations. These resources should include both educational programs and tax filing and preparation assistance. By offering these resources, student-athletes will improve their tax literacy and earn and report NIL compensation confidently and correctly.

This paper addresses the implications surrounding NIL by examining the tax consequences of student-athletes. Part I covers the background of the NCAA and the rise of NIL in college athletics. Part II examines the tax issues student-athletes might face at both the federal and state levels as they receive compensation for the use of their NIL. Part III offers recommendations to the NCAA and its member institutions to better educate student-athletes about their tax liability and requests certain actions from the Treasury to provide uniformity and clarification as to how student-athletes should file their taxes.

I. THE RISE OF NIL

To consider the tax implications of NIL income, it is important to understand NIL income and its origins.

The Pay-for-Play Debate

The National Collegiate Athletic Association (NCAA) has historically been against pay-for-play.¹⁴ Since its creation in 1906, the NCAA has been a medium for organized intercollegiate athletic competition.¹⁵ The goal of the NCAA since it started has been to provide a place for amateur athletes to compete and receive education.¹⁶ Because of this, the NCAA instated many rules and

selective-
service#:~:text=Almost%20all%20men%20who%20are,%2C%20dual%20citizens%2C%20and%20naturalized).

¹⁴ Stanton Wheeler, *Rethinking Amateurism and the NCAA*, 15 Stan. L. & Pol'y Rev. 213, 227 (2004).

¹⁵ Michael Steele, *O'Bannon V. NCAA: The Beginning of the End of the Amateurism Justification for the NCAA in Antitrust Litigation*, 99 Marq. L. Rev. 511, 513 (2015).

¹⁶ *Id.*

regulations to keep these athletes amateurs, focusing on the fact that these athletes are students, not professionals.¹⁷

One of the major rules was that student-athletes were not able to earn compensation for their athletic services.¹⁸ Article 12 of the NCAA bylaws states that a student-athlete is not able to participate in intercollegiate athletics if the student-athlete either “(a) [a]ccepts any remuneration for or permits the use of the student-athlete’s name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind; or (b) [r]eceives remuneration for endorsing a commercial product or service through the student-athlete’s use of such product or service.”¹⁹

Myles Brand, former president of the NCAA, stated that if student-athletes earn compensation, “you essentially ruin the integrity of the college game. You take a first-rate set of college athletics programs and turn them into third-rate professional programs.”²⁰ Recent antitrust litigation and state legislation have changed the NCAA’s outlook on student-athlete compensation.

O’Bannon v. NCAA

In 1995, Ed O’Bannon was a star basketball player and led the University of California, Los Angeles (UCLA) men’s basketball team to a National Championship.²¹ Later, O’Bannon became the lead plaintiff in an antitrust lawsuit against the NCAA.²² In *O’Bannon v. NCAA*, O’Bannon sued the NCAA and Collegiate Licensing Company (CLC), alleging that the NCAA rules prohibiting student-athletes from earning compensation for the use of their NIL were an unlawful restraint on trade under Section 1 of the Sherman Act by causing anticompetitive effects in both the market for college education and the group licensing market.²³

¹⁷ NCAA, Division I 2023-24 Manual, art. 12.5.2.1 (2023).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Wheeler, *supra* note 14.

²¹ Luis Ortiz, *Where Are They Now? Ed O’Bannon*, Bleacher Rep. (Jul. 7, 2009), <https://bleacherreport.com/articles/213840-where-are-they-now-ed-o-bannon>.

²² See generally *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014).

²³ Alex Mcleod, *O’Bannon v. NCAA*, Am. Univ. L. Rev. (Nov. 16, 2015), <https://aublr.org/?s=o%27bannon>; Molly Richard, *More than an Athlete: The Student-*

On appeal, the Ninth Circuit ultimately held that the NCAA could give scholarships up to the full cost of attendance in addition to tuition, room, board, and books.²⁴ Although the Ninth Circuit did not allow compensation for NIL income, O'Bannon remains a win for student-athletes as it started the conversation of challenging the NCAA's rules protecting amateurism.²⁵

NCAA v. Alston

The Supreme Court heard *NCAA v. Alston* on June 21, 2021.²⁶ In *NCAA v. Alston*, current and former Division I FBS football players and men's and women's basketball players filed a class action lawsuit against the NCAA and eleven Division I Conferences, claiming that the NCAA violated antitrust law by limiting student-athlete compensation.²⁷ The athletes argued that the NCAA held a monopsony over intercollegiate athletics and used its power to restrict the pay of student-athletes to below market level.²⁸ The athletes argued that without the NCAA's limits, the athletes would have been able to financially benefit from their athletic services.²⁹ The NCAA argued that the restrictions were procompetitive and preserved the demand for college sports by protecting amateurism.³⁰

The district court conducted a fact-intensive rule of reason analysis and determined that the NCAA's rules limiting the compensation of student-athletes violated §1 of the Sherman Act by unreasonably restraining competition among schools for college athletes.³¹ Although the court gave the NCAA credit that some of its compensation limits did help preserve consumer demand, it found that the NCAA could accomplish this through less restrictive

Athlete Compensation Debate and Its Potential Tax Consequences on the NCAA, 55 Suffolk U. L. Rev. 267, 276 (2022).

²⁴ O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1053 (9th Cir. 2015).

²⁵ Richard, *supra* note 23, at 277.

²⁶ See generally Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021).

²⁷ *Id.*

²⁸ Richard, *supra* note 23, at 277; Haley A. Ritter, *Stars on the Field, Benchwarmers on the Tax Return: Student-Athletes and the Tax Ramifications of Name, Image, and Likeness Deals*, 26 Chap. L. Rev. 401, 410 (2022).

²⁹ *Id.*

³⁰ *Id.*

³¹ *NCAA v. Alston*, 135 Harv. L. Rev. 471, 473 (2021).

means.³² The Ninth Circuit affirmed the district court's decision, stating that the district court "struck the right balance in crafting a remedy that both prevents anticompetitive harm to [s]tudent-[a]thletes while serving the procompetitive purpose of preserving the popularity of college sports."³³

The NCAA appealed this decision, and the Supreme Court granted certiorari and affirmed the district court's judgment that the NCAA's limits on education-related benefits violated antitrust law.³⁴

Justice Kavanaugh, in his concurring opinion, foreshadowed the significant changes that may come to the NCAA's compensation rules. Justice Kavanaugh noted that in addition to education-related benefits, the remainder of the NCAA's limitations on student-athlete compensation are subject to the same scrutiny.³⁵ Justice Kavanaugh stated that the NCAA's argument was "circular and unpersuasive" and that this "business model would be flatly illegal in almost any other industry."³⁶ He finished his concurrence by emphasizing that the NCAA is "not above the law."³⁷

While the decision has no direct effect on NIL licensing, the holding provides some protections to institutions and student-athletes from any restraints the NCAA may try to enforce regarding NIL rights.³⁸

State Legislation and NCAA Response

California was the first state to allow student-athletes to profit from the use of their NIL through the passing of the Fair Pay to Play Act (FPTP Act).³⁹ The FPTP Act "guarantees college athletes a right to profit from their identities" despite the prohibitive bylaws of the NCAA.⁴⁰ The FPTP Act allows student-athletes in California

³² *Id.*

³³ *Id.*

³⁴ Ritter, *supra* note 28, at 410-11.

³⁵ *Id.* at 411.

³⁶ *Id.* at 411-12.

³⁷ *Id.* at 412.

³⁸ John T. Holden & Kathryn Kisska-Schulze, *Taxing Sports*, 71 Am. Univ. L. Rev. 845, 888 (2022).

³⁹ Richard, *supra* note 23, at 267, 285; see Fair Pay to Play Act, Cal. Educ. Code § 67456 (2020).

⁴⁰ Richard, *supra* note 23, at 267, 286.

to have agents and enter into endorsement deals with outside third parties for the use of their NIL.⁴¹ Additionally, under the Act, NCAA member colleges and universities in California cannot rescind or modify the scholarships of players who earn money from NIL.⁴²

Since the passing of California's law, other states have introduced their own bills allowing student-athletes to profit from the use of their NIL.⁴³ By May 2021, twenty-eight out of the fifty states passed similar legislation to the FPTP Act.⁴⁴

In response to the surge in state legislation on NIL, the NCAA became concerned with the lack of uniformity between states because of the possible creation of unfair recruiting advantages.⁴⁵ To address this concern, on June 30, 2021, the NCAA adopted an interim NIL policy suspending NCAA NIL rules for all student-athletes.⁴⁶ The policy allows student-athlete engagement in NIL activities that are consistent with the law of the state where their school is located.⁴⁷ If college athletes attend a school in a state without NIL legislation, under this interim rule, they can engage in NIL deals without violating NCAA rules related to NIL.⁴⁸ Additionally, student-athletes may use an agent, and they must report all NIL activities to their school.⁴⁹ Despite this interim policy, the NCAA still upholds that this new policy still "preserves the fact college sports are not pay-for-play."⁵⁰

To date, thirty-two states have passed NIL laws.⁵¹ These states have largely modeled their laws after California's FPTP Act.

⁴¹ *Id.*; Kathryn Kisska-Schulze & Adam Epstein, *Changing the Face of College Sports One Tax Return at a Time*, 73 Okla. L. Rev. 457, 470 (2021).

⁴² Richard, *supra* note 23, at 267, 286.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx>.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Shehan Jeyarajah, *NCAA Clarifies NIL Policy to Member Schools, Explains Why It Must Be Prioritized Over State Laws, Per Reports*, CBS Sports (June 27, 2023), <https://www.cbssports.com/college-football/news/ncaa-clarifies-nil-policy-to-member-schools-explains-why-it-must-be-prioritized-over-state-laws-per->

⁵² When state law conflicts with the NCAA's NIL policy, the Association clarifies that member schools must adhere to NCAA legislation.⁵³ This is not necessarily enforceable, however.

The NCAA continues to work with Congress to adopt federal legislation to address NIL.⁵⁴

II. TAX IMPLICATIONS OF NIL

Self-Employment Tax

The government enacted the Federal Insurance Contributions Act (FICA) in 1935 to fund social security programs.⁵⁵ FICA established the payroll tax which acts as the main revenue source for both Social Security and Medicare.⁵⁶ The payroll tax is a split contribution plan between employers and their employees.⁵⁷ Employers and employees divide the payroll tax burden evenly.⁵⁸ Meaning at the current rate of 15.3% imposed on income earned, employees and employers each have a tax burden of 7.65%.⁵⁹

With no employer to share the tax burden with, self-employed persons, however, must pay the entire 15.3% self-employment tax out of their net income earnings.⁶⁰ The rate consists of two parts: 12.4% for Social Security and 2.9% for Medicare.⁶¹ The social security part of the self-employment tax is imposed on the first

reports/#:~:text=So%20far%2C%2032%20states%20have,enforcing%20its%20own%20NIL%20policy.

⁵² *NIL Legislation Tracker*, Saul Ewing, <https://www.saul.com/nil-legislation-tracker>.

⁵³ Jeyarajah, *supra* note 51. The NCAA cannot enforce this, however. A student-athlete cannot violate state law to follow NCAA rules without facing consequences.

⁵⁴ Hosick, *supra* note 46.

⁵⁵ Kisska-Schulze & Epstein, *supra* note 41, at 493 (citing Patricia E. Dilley, *Through the Doughnut Hole: Reimagining the Social Security Contribution and Benefit Base Limit*, 62 Admin. L. Rev. 367, 391-92 (2010)).

⁵⁶ *Id.* (citing Kathryn Kisska-Schulze & Karie Davis-Nozemack, *Humans vs. Robots: Rethinking Tax Policy for a More Sustainable Future*, 79 Md. L. Rev. 1009, 1021 (2020)).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ (*Circular E*), *Employer's Tax Guide*, I.R.S. Pub. 15, Cat No. 10000W (Dec. 13, 2022), <https://www.irs.gov/pub/irs-pdf/p15.pdf>.

⁶⁰ *Self-Employment Tax (Social Security and Medicare Taxes)*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/self-employment-tax-social-security-and-medicare-taxes> (last updated Aug. 3, 2023).

⁶¹ *Id.*

\$160,200 of net income earned while all net income is subject to the Medicare portion of the self-employment tax.⁶² If wages, compensation, or self-employment income exceed the threshold amount for a taxpayer's respective filing status, which is \$200,000 for single filers, then a taxpayer is liable for an additional 0.9% Medicare tax.⁶³ A person must pay these taxes in addition to their income taxes.⁶⁴

Unlike professional athletes, who are employees of their respective teams, student-athletes are not employees of their school, the NCAA, or a collective. Thus, they will qualify as independent contractors and will have to pay the self-employment tax.⁶⁵

If a student-athlete earned \$400 or more in net earnings from self-employment in a taxable year, they must pay self-employment taxes and file a Schedule SE (Form 1040 or 1040-SR).⁶⁶ Student-athletes will have to be knowledgeable of Schedule SE (Self-Employment Tax) of their Form 1040 and be ready to file estimated quarterly tax payments on Form 1040ES as most self-employed persons must do.⁶⁷ This means that student-athletes must calculate their taxes four times a year to get an accurate estimate

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Self-Employed Individuals Tax Center*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/self-employed-individuals-tax-center> (last visited Aug. 29, 2023).

⁶⁵ *ProSportsTax's Frequently Asked Questions*, ProSportsTax, <http://www.prosportstax.com/faq-from-pro-sports-tax.shtm> (last visited Aug. 29, 2023) (stating that "[t]he overriding majority of professional athletes, however, are treated as employees"); *Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285 (7th Cir. 2016), (holding that that student-athletes were not employees and are not covered by the Fair Labor Standards Act); *Dawson v. Nat'l Collegiate Athletic Ass'n*, 932 F.3d 905 (9th Cir. 2019) (holding a student-athlete in a football program was not an employee of the NCAA or Pac-12 under the Fair Labor Standards Act); *Northwestern Univ.*, 362 NLRB 167 (2015); Marena M. Messina & Frank M. Messina, *A Primer on the Income Tax Consequences of the NCAA's Name, Image and Likeness (NIL) Earnings for College Athletes*, 4 J. Athlete Dev. & Experience 189, 191 (2022); *Self-Employment Tax*, IRS, <https://www.irs.gov/individuals/international-taxpayers/self-employment-tax> (last updated Aug. 11, 2023).

⁶⁶ *Self-Employment Tax (Social Security and Medicare Taxes)*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/self-employment-tax-social-security-and-medicare-taxes> (last updated Aug. 3, 2023).

⁶⁷ *Self-Employed Individuals Tax Center*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/self-employed-individuals-tax-center> (last updated Aug. 3, 2023).

to make their quarterly tax payments in addition to becoming familiar with their taxes to file on tax day.

Taxable Income

Unless specifically excluded by law, gross income includes any income received by an individual.⁶⁸ This means that student-athletes' gross income will include NIL earnings, whether in the form of actual cash or non-monetary items such as property, accommodations, or services provided.⁶⁹

Royalties

One of the most common forms of professional athlete income is annual income from endorsement contracts.⁷⁰ These contracts either (1) require the athlete to wear the sponsor's apparel and use its products during performance, known as an "on-court" or "on-course" contract, or (2) require the athlete to simply endorse a brand or product using the athlete's NIL, known as an "off-court" or "off-course contract."⁷¹ On-court contracts usually contain both a services and a royalty component.⁷² Athletes receive compensation for services such as making appearances or testing new products.⁷³ Royalties include compensation for the sponsor's right to use the athlete's NIL in advertising for the sponsor's company or brand.⁷⁴

Student-athletes who use their NIL to advertise for a sponsor will earn compensation through royalty payments like professional athletes. Certain states have even enacted legislation requiring those who make team jerseys, video games, and trading cards to pay royalties to the student-athletes whose NIL appears in such products.⁷⁵

Compensation in the form of royalty payments will be an integral part of student-athlete taxable income in the new NIL

⁶⁸ I.R.C. § 61(a).

⁶⁹ *Id.*

⁷⁰ Michael J. Bruno, Steven Hadjillogiou & Robert H. Moore, *The Taxation of Royalty Payments to International Athletes*, 9 *Landslide* 36, 37 (2016).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See S. 1505, 81st Leg., Reg. Sess. (Or. 2022) (effective July 1, 2022).

landscape and thus, will have applicable taxes.⁷⁶ Royalty payments usually are self-employment income and are subject to ordinary income tax rates.⁷⁷

For example, Player *A* is a star quarterback for University *B*. Player *A* enters into an endorsement contract with Corporation *X*, a cleat company. Player *A* allows Corporation *X* to use their NIL on all 2024 advertisements for their cleats in exchange for \$5,000. Player *A* will include all \$5,000 from the endorsement contract as royalty income in their gross income and will have to account for it on their Form 1040.

Cryptocurrency and Peer-to-Peer Platform Payments

In the digital age, it is probable that student-athletes will acquire some of their NIL earnings through peer-to-peer payment platforms such as Venmo, PayPal, or Cash App or through cryptocurrency such as Bitcoin. Student-athletes must include all cash receipts, including the money collected from these peer-to-peer platforms or cryptocurrency, in their gross income.⁷⁸ Student-athletes are responsible for keeping track of and reporting this income received through digital means on their Schedule C.⁷⁹

Constructively Received Income

An item of income is includible in an individual's gross income for the taxable year in which it is actually or constructively received.⁸⁰ Income is actually received when it is in the physical possession of the taxpayer.⁸¹ Constructive receipt of income occurs when a party obtains income that is not yet physically received but has been credited to the taxpayer's account and over which they have immediate, unfettered control.⁸² Income is not constructively received if the taxpayer's control over its receipt is subject to substantial limitations or restrictions.⁸³

⁷⁶ I.R.C. § 61(a).

⁷⁷ I.R.C. § 61(a); see Kisska-Schulze & Epstein, *supra* note 41, at 484.

⁷⁸ I.R.C. § 61(a).

⁷⁹ Messina & Messina, *supra* note 65, at 192.

⁸⁰ Treas. Reg. § 1.451-1(a).

⁸¹ I.R.C. § 451(a).

⁸² Treas. Reg. § 1.451-2(a).

If a student-athlete receives compensation for the use of their NIL, they will owe tax as soon as they have control over the compensation.⁸⁴ For example, Player A makes a deal with Corporation X for Corporation X to use Player A's NIL in their Spring 2024 advertisements. Corporation X transfers \$5,000 to Player A's Venmo as compensation for the use of Player A's NIL on May 31, 2024. Even if Player A never accesses their Venmo account to use this money, Player A must include the \$5,000 in their 2024 gross income because they constructively received the income on May 31 of that taxable year.

Assignment of Income

The assignment of income doctrine states that the taxpayer who earns the income must pay the tax on that income, even if the taxpayer gave the right to collect the income to another person.⁸⁵ Where a taxpayer does not actually receive the income, it is still realized income to him if he has control over how it is used.⁸⁶

For example, Player A makes a deal with Corporation X for Corporation X to use Player A's NIL in their 2024 magazine spread in exchange for \$10,000. Player A refuses to accept compensation for this deal because they love Corporation X and instead tells Corporation X to designate all their compensation from this deal to University B as a donation. Player A must still report the \$10,000 as taxable income on their Form 1040 because Player A asserted dominance and control over the use of the compensation. Player A chose where to donate the money.

Prepaid Income

Like constructively received income, prepaid income, such as compensation for future services, is generally taxable in the year the individual receives it.⁸⁷

⁸³ *IRS Discusses Actual, Constructive Receipt of Income*, Taxnotes (Dec. 1, 2014), <https://www.taxnotes.com/research/federal/irs-private-rulings/information-letters/irs-discusses-actual%2C-constructive-receipt-of-income/1fkvv>.

⁸⁴ Treas. Reg. § 1.451-2(a).

⁸⁵ *Lucas v. Earl*, 281 U.S. 111, 114-15 (1930).

⁸⁶ *Commissioner v. Gianni*, 129 F.2d 638 (1942).

Thus, student-athletes will include any prepaid income from NIL deals in the taxable year they receive the income.⁸⁸ For example, if Player A enters a NIL deal for Corporation X to use their NIL in 2026 and receives \$5,000 as prepaid income in 2024, Player A will include the \$5,000 in their 2024 taxable income on Form 1040. Player A will not include the \$5,000 received in their 2026 taxable income.

Fringe Benefits and Recruitment Incentives

Unless specifically excluded from income by law, gross income also includes the receipt of fringe benefits.⁸⁹ A fringe benefit is a form of pay provided to any person for the performance of services received in addition to wage payments.⁹⁰ Fringe benefits may also be given for the non-performance of services such as under a covenant not to compete.⁹¹ Fringe benefits can be goods or services and are given to employees as incentives for a greater effort, as conveniences for the employers, or to promote employee health, goodwill, and efficiency.⁹² Fringe benefits are not exclusive to employees, however; any person performing services, such as independent contractors, may receive fringe benefits for the performance of these services.⁹³

A client or customer of the individual or entity that employs or contracts the recipient of the benefit can indirectly provide fringe benefits.⁹⁴ The recipient of the benefit will be the individual who performs the services, even if someone else receives the benefit.⁹⁵

Examples of taxable fringe benefits can include frequent-flier miles, hotel rewards points, cellular or internet services, and rental car preferred status.⁹⁶ Taxable fringe benefits may also include

⁸⁸ *Id.*

⁸⁹ I.R.C. § 61(a)(1); I.R.C. § 132(a); Treas. Reg. § 1.61-21(a)(2).

⁹⁰ Treas. Reg. § 1.61-21(a)(2).

⁹¹ *Publication 15-B (2023), Employer's Tax Guide to Fringe Benefits*, IRS (2023), <https://www.irs.gov/publications/p15b>.

⁹² J. Henry Landman, *The Taxability of Fringe Benefits*, 33 *Taxes* 173 (1955).

⁹³ *Publication 15-B (2023), Employer's Tax Guide to Fringe Benefits*, IRS (2023), <https://www.irs.gov/publications/p15b>.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Treas. Reg. § 1.61-21(b)(i)-(ii); Jay A. Soled & Kathleen DeLaney Thomas, *Revisiting the Taxation of Fringe Benefits*, 91 *Wash. L. Rev.* 761, 763-64 (2016); Kisska-Schulze & Epstein, *supra* note 41, at 486.

certain employer-provided perks such as automobiles, free airline flights, vacations, sporting event tickets, and in some cases, free lunches, massages, and dance lessons.⁹⁷ If a student-athlete receives any fringe benefits in connection with the performance of services relating to their NIL, they must include the value of these benefits in their taxable income unless it is otherwise excluded by law.⁹⁸ If a student-athlete pays fair market value for the benefit, then the value of the benefit will not be included in gross income.⁹⁹

For example, if Corporation *X* gives Player *A*, in connection with Player *A* using their NIL to promote Corporation *X* on social media, \$10,000 in cash, the player's spring break vacation and flights that total in value to \$2,000, a car with a use value of \$1,000 for the period the player has access to it, and sporting event tickets valued at \$300, then Player *A* must include \$13,300 in their gross income for the taxable year. The same would apply if Player *A*'s family member received the benefits in connection with the use of Player *A*'s NIL. Likewise, the same would apply if a client or customer of Corporation *X* gave Player *A* these benefits in connection with the use of Player *A*'s NIL.

If Player *A* pays the fair market value for these benefits in exchange for the use of their NIL, then Player *A* does not need to include the value of these benefits in their gross income for the taxable year.

Deductions

Tax deductions are available to reduce a person's taxable income.¹⁰⁰ There are two principal forms of deductions: (1) the standard deduction and (2) itemized deductions.¹⁰¹ Other deductions potentially available to student-athletes include a deduction for business expenses and a deduction for student loan interest.¹⁰²

⁹⁷ *Id.*

⁹⁸ I.R.C. § 61(a)(1); I.R.C. § 132(a); Treas. Reg. § 1.61-21(a)(2).

⁹⁹ Treas. Reg. § 1.61-21(b)(i)-(ii).

¹⁰⁰ *Deductions for Individuals: What They Mean and the Differences Between Standard and Itemized Deductions*, IRS, <https://www.irs.gov/newsroom/deductions-for-individuals-what-they-mean-and-the-difference-between-standard-and-itemized-deductions> (last updated Apr. 10, 2023).

¹⁰¹ I.R.C. § 63(c)-(d).

Standard Deduction v. Itemized Deductions

Since only about 10% of American taxpayers used itemized deductions in 2022, most student-athletes will claim the standard deduction, as well.¹⁰³ The standard deduction is a specific dollar amount that reduces the amount of a taxpayer's income.¹⁰⁴ It consists of the sum of the basic standard deduction and any additional standard deduction amounts for age and/or blindness.¹⁰⁵ The basic standard deduction is a flat amount based on a taxpayer's filing status: single; married filing separately; married filing jointly; head of household; or qualifying surviving spouse.¹⁰⁶

Some student-athlete taxpayers may benefit by itemizing their deductions if their allowable itemized deductions total is greater than their standard deduction.¹⁰⁷ Some may want to itemize their deductions if their standard deduction is limited because another taxpayer claims them as a dependent.¹⁰⁸ Itemized deductions, subject to certain dollar limitations, include amounts a taxpayer paid, during the taxable year, for state and local income or sales taxes, real property taxes, personal property taxes, mortgage interest, disaster losses, gifts to charities, and part of the amount paid for medical and dental expenses.¹⁰⁹ If student-athletes choose to itemize their deductions, they will use Schedule A (Form 1040 or 1040-SR) to calculate their itemized deductions and will need to keep detailed records of their expenses.¹¹⁰

¹⁰² *Credits and Deductions for Individuals*, IRS, <https://www.irs.gov/credits-deductions-for-individuals> (last updated Apr. 24, 2023).

¹⁰³ Holden & Kisska-Schulze, *supra* note 38, at 888.

¹⁰⁴ *Deductions for Individuals: What They Mean and the Differences Between Standard and Itemized Deductions*, IRS, <https://www.irs.gov/newsroom/deductions-for-individuals-what-they-mean-and-the-difference-between-standard-and-itemized-deductions> (last updated Apr. 10, 2023).

¹⁰⁵ *Id.*

¹⁰⁶ *Topic No. 501, Should I Itemize?*, IRS, <https://www.irs.gov/taxtopics/tc501> (last updated Sept. 19, 2023).

¹⁰⁷ *Id.*; *Deductions for Individuals: What They Mean and the Differences Between Standard and Itemized Deductions*, IRS, <https://www.irs.gov/newsroom/deductions-for-individuals-what-they-mean-and-the-difference-between-standard-and-itemized-deductions> (last updated Apr. 10, 2023).

¹⁰⁸ *Topic No. 501, Should I Itemize?*, IRS, <https://www.irs.gov/taxtopics/tc501> (last updated Sept. 19, 2023).

¹⁰⁹ *Id.*

Ordinary and Necessary Business Expenses

In general, a taxpayer can deduct all the ordinary and necessary expenses paid or incurred in carrying on a trade or business during the taxable year, provided that the amount of such expenses is reasonable.¹¹¹

An ordinary expense is one that is “common and accepted” in the industry.¹¹² An expense does not need to be a regular and recurring event to be ordinary; even one-time payments can be considered ordinary within an industry.¹¹³ For example, if a company defends itself against litigation, attorney fees will be considered ordinary within the meaning of Section 162 even though these expenses are usually not routine.¹¹⁴ A necessary expense is one that is “helpful and appropriate” to the trade or business.¹¹⁵

To be engaged in a trade or business, the taxpayer must be involved in the activity with continuity and regularity, and the taxpayer’s primary purpose in engaging in the activity must be for income or profit as opposed to an activity in which the taxpayer engages in sporadically, as a hobby, or for amusement.¹¹⁶

Section 162 outlines specific ordinary and necessary business expenses that may be deducted if they are paid or incurred during the taxable year while carrying on a trade or business.¹¹⁷ These include a reasonable allowance for salaries or other compensation for personal services actually rendered¹¹⁸ and necessary travel expenses incurred while away from home in pursuit of a trade or business.¹¹⁹

For professional athletes, ordinary and necessary business expenses include the expenses “(1) paid or incurred during the

¹¹⁰ *Deductions for Individuals: What They Mean and the Differences Between Standard and Itemized Deductions*, IRS, <https://www.irs.gov/newsroom/deductions-for-individuals-what-they-mean-and-the-difference-between-standard-and-itemized-deductions> (last updated Apr. 10, 2023); Holden & Kisska-Schulze, *supra* note 38, at 889.

¹¹¹ I.R.C. § 162(a).

¹¹² *Welch v. Helvering*, 290 U.S. 111, 114-15 (1933) (noting that an “ordinary” expense is one that is normal or common within the business community).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 113 (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)).

¹¹⁶ *Comm’r v. Groetzinger*, 480 U.S. 23, 35-36 (1986).

¹¹⁷ I.R.C. § 162(a).

¹¹⁸ I.R.C. § 162(a)(1).

¹¹⁹ I.R.C. § 162(a)(2).

taxable year, (2) related to the business of playing professional sports, (3) common to that particular business, and (4) reasonable in cost.”¹²⁰ Historically, these deductions have included agent fees, the fees of tax counselors and preparers, and even fines imposed by a team, league, or commissioner, as they could be considered a common and accepted practice in sports to enforce discipline.¹²¹ Professional athletes could also deduct off-season expenses such as those connected to conditioning and maintaining good physical condition prior to the start of the regular season if these expenses were not for personal fun or relaxation.¹²² The Tax Cuts and Jobs Act (TCJA) effectively eliminated many of these tax benefits previously available to professional athletes by suspending “miscellaneous itemized deductions.”¹²³ Despite this cut, travel expenses such as meals and lodging incurred by professional athletes in relation to their trade or business that are not otherwise reimbursable by their team or other entity remain deductible expenses if they qualify as ordinary and necessary.¹²⁴

Like professional athletes, student-athletes may be able to deduct certain expenses as ordinary and necessary business expenses. Costs such as air travel and vehicle mileage relating to their income-generating NIL activities could be deductible.¹²⁵ Other deductible expenses could include cameras or other equipment for filming sponsored videos or posts.¹²⁶ The expenses already incurred by student-athletes’ schools would not be deductible such as the expenses for training equipment, massage therapy, and travel related to their sport.¹²⁷ Because of the passing

¹²⁰ Kisska-Schulze & Epstein, *supra* note 41, at 459 (citing Kathryn Kisska-Schulze, *Analyzing the Applicability of IRC § 162 on the Pay-for-Play Model*, 16 Va. Sports & Ent. L.J. 190, 190 (2017)).

¹²¹ Kara Fratto, *The Taxation of Professional U.S. Athletes in Both the United States and Canada*, 14 Sports Lar. J. 29, 31-32 (2007).

¹²² *Id.* at 32; *Stemkowski v. Comm’r*, 690 F.2d 40 (2d Cir. 1982) (holding that not all of Stemkowski’s exercises to strengthen and coordinate his body such as golf, tennis, and squash were for business purposes).

¹²³ Kisska-Schulze & Epstein, *supra* note 41, at 489-90 (citing I.R.C. § 67(g) (scheduling a suspension through tax year 2025)).

¹²⁴ I.R.C. § 162(a)(2) (excluding meals and lodging identified as “lavish or extravagant”).

¹²⁵ *Id.*

¹²⁶ Ritter, *supra* note 28, at 424.

¹²⁷ Kisska-Schulze & Epstein, *supra* note 41, at 490.

of the TCJA, student-athletes also would not be able to deduct the cost or fees of hiring an agent to make NIL deals on their behalf through 2025.¹²⁸ After the expiration of the TCJA in 2025, student-athletes can expect to be able to deduct these agent fees, as well as expenses for training, gym memberships, and other expenses similar to those professional athletes deducted before the passing of the TCJA.

Self-Employment Tax Deduction

Student-athletes will get a tax break as self-employed taxpayers from the IRS and will be able to deduct an amount equivalent to the employer portion of the self-employment tax from their net income.¹²⁹ This deduction only affects their income tax, not their net earnings from self-employment or their self-employment tax.¹³⁰

Identifying a Tax Home

To deduct ordinary and necessary traveling expenses incurred while in pursuit of a trade or business, student-athletes need to determine their tax home.¹³¹ This is because travel expenses are only deductible “while away from home.”¹³²

For student-athletes who live at multiple residences, identifying a tax home becomes more difficult.¹³³ Circuits are split on whether a taxpayer’s tax home is where their principal place of business is located or their actual residence.¹³⁴ The tax homes of professional athletes are usually where the team they play for is located.¹³⁵ Student-athletes are similar to professional athletes in that they play a team sport and live the majority of the year where

¹²⁸ *Id.*; Lisa Barringer, *IRS Increases Focus on Athletes and Entertainers*, RSM (Dec. 9, 2020), <https://rsmus.com/insights/services/private-client/irs-increases-focus-on-athletes-and-entertainers.html>.

¹²⁹ I.R.C. § 164(f)(1).

¹³⁰ *Self-Employment Tax (Social Security and Medicare Taxes)*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/self-employment-tax-social-security-and-medicare-taxes> (last updated Aug. 3, 2023).

¹³¹ Ritter, *supra* note 28, at 424.

¹³² I.R.C. § 162(a)(2).

¹³³ Ritter, *supra* note 28, at 424.

¹³⁴ *Id.* at 424-25.

¹³⁵ *Id.* at 425.

their team is located.¹³⁶ Student-athletes will most likely classify their tax home as the city in which their college is located, but there is currently no clarification from the Treasury as to where a student-athlete's tax home is.

Effect on Financial Aid

Many student-athletes currently attend their college or university on an athletic scholarship. Although Section 61 of the IRC requires individuals to include all income from whatever source derived in their gross income, Section 117 allows an exclusion from gross income all money received in the form of qualified scholarships by an individual obtaining a degree.¹³⁷

A qualified scholarship is any amount of money received as a scholarship or fellowship grant to pay for qualified tuition and related expenses.¹³⁸ The term qualified tuition and related expenses refers to tuition and fees required for enrollment as well as any fees, books, supplies, and equipment required for courses of instruction.¹³⁹ This includes an athletic scholarship received by a player to cover their tuition and fees.

This exclusion does not apply to the extent that the scholarship or grant represents a payment for teaching, research, or other services by the student required as a condition for receiving the otherwise excludable amount.¹⁴⁰ This means that there cannot be a *quid pro quo* relationship between a student-athlete's participation in their sport and their receipt of the scholarship.¹⁴¹ Such a relationship would require that the student-athlete's scholarship funds be taxed.¹⁴² The IRS has held that no evidence of *quid pro quo* currently exists in college sports that would require this taxation.¹⁴³ Revenue Ruling 77-263 specifies that "athletic scholarships are awarded by the university primarily to aid the

¹³⁶ *Id.*

¹³⁷ I.R.C. § 61(a); I.R.C. § 117(a).

¹³⁸ I.R.C. § 117(b)(1).

¹³⁹ I.R.C. § 117(b)(2).

¹⁴⁰ I.R.C. § 117(c); see *Bingler v. Johnson*, 394 U.S. 741 (1969).

¹⁴¹ Kathryn Kisska-Schulze, *This Is Our House! - The Tax Man Comes to College Sports*, 29 Marq. Sports L. Rev. 347, 356 (2019).

¹⁴² *Id.*

¹⁴³ *Id.*

recipients in pursuing their studies, and therefore, the value of the scholarships is excludable from the recipients' gross income"¹⁴⁴

Although the Code presently allows the exclusion of student-athlete scholarships, student-athletes should be aware that this may change and so may the tax-exempt status of their scholarships. Legislators have already introduced bills that deny the tax exclusion for athletic scholarships for student-athletes who make more than a certain amount of money of profit during the taxable year from their NIL.¹⁴⁵ Even before NIL legislation, the taxing of student-athlete scholarships had already been in discussion.¹⁴⁶

If authorities eliminate or take into question the qualified scholarship exclusion of student-athlete scholarships, student-athletes may need to keep track of or limit how much NIL income they receive to keep their scholarship non-taxable.

International and Resident Alien Student-Athletes

Student-athletes who are resident aliens are subject to the same tax responsibilities as student-athletes who are United States citizens.¹⁴⁷ Per the Internal Revenue Code, United States citizens are taxed on their worldwide income regardless of the source that the income is derived from.¹⁴⁸ Likewise, resident aliens are subject to the same tax responsibilities as United States citizens.¹⁴⁹ Nonresident aliens, however, are only subject to U.S. taxes on U.S. source income which includes income connected to a U.S. trade or business.¹⁵⁰ This means that, within this taxing structure, student-athletes, regardless of their citizen, resident, or nonresident alien status, will be subject to the U.S. federal tax rules if they earn income through the use of their NIL.

¹⁴⁴ Rev. Rul. 77-263, 1977-2 C.B. 47.

¹⁴⁵ Holden & Kisska-Schulze, *supra* note 38, at 869-70.

¹⁴⁶ See generally Patrick C. Johnston, *Northwestern Football and College Athletics: Be Careful What You Wish For*, 49 J. Marshall L. Rev. 655 (2015).

¹⁴⁷ I.R.C. § 871(b); see also I.R.C. § 7701(b) (defining a resident alien as an individual who qualifies as either a permanent resident of the United States under immigration laws, known as the "green card test," or who meets the "substantial presence test").

¹⁴⁸ I.R.C. § 61(a) ("[G]ross income means all income from whatever source derived...").

¹⁴⁹ I.R.C. § 871(b); see also I.R.C. § 7701(b) (defining a resident alien as an individual who qualifies as either a permanent resident of the United States under immigration laws, known as the "green card test," or who meets the "substantial presence test").

¹⁵⁰ I.R.C. § 871(b).

International student-athletes should proceed with caution if student-athletes become employees of their university. As stated, if student-athletes become employees, their scholarships may no longer fall within the definition of a qualified scholarship.¹⁵¹ In this case, the scholarships of international student-athletes may be subject to a 14% tax withholding.¹⁵² This withholding also applies to any NIL income that is “fixed or determinable, annual or periodical” such as royalties.¹⁵³

State Tax Considerations

In addition to federal income tax, student-athletes who financially benefit from the use of their NIL will have to pay state taxes, as well. States have the constitutional power to tax both (1) residents on all sources of income no matter where derived and (2) nonresidents on all income earned from sources within the state.¹⁵⁴ Thus, student-athletes may have to file taxes in more than one state.

Student-Athlete State of Residency and State Taxes

Each state has different rules for whether an individual qualifies to be a resident of their state. For example, California defines a resident for tax purposes as an individual who is (1) in California for other than a temporary or transitory purpose or (2) domiciled in California, but who is outside of California for a temporary or transitory purpose.¹⁵⁵ In Georgia, an individual is recognized as a tax resident if the individual was actually located

¹⁵¹ Kisska-Schulze, *supra* note 141, at 356.

¹⁵² I.R.C. § 1441(a). There are also limitations concerning their F-1 non-immigrant student visa which allow foreign students to pursue academic studies in the U.S. The general rule is that if an international student-athlete is actively working in the U.S. that will violate their F-1 visa status. These tax implications apply if these visa limitations change and do not apply, and international student-athletes are allowed to work in the U.S. Ashley Beth, *International Student-Athletes Lose Out in NIL Era*, Loy. U. Chi. L.J. Blog (Dec. 8, 2021), <https://blogs.luc.edu/compliance/?p=4325>.

¹⁵³ I.R.C. § 871(a)(1); Treas. Reg. § 1.871-7. International professional athletes are subject to withholding tax at a 30% rate on all U.S. source royalty income. Michael J. Bruno, Steven Hadjilogiou & Robert H. Moore, *The Taxation of Royalty Payments to International Athletes*, 9 *Landslide* 36, 37 (2016).

¹⁵⁴ *Shaffer v. Carter*, 252 U.S. 37, 52-59 (1920) (holding that states may tax nonresidents on all income derived from a source within the state).

in the state for 183 days or more in a taxable year.¹⁵⁷ North Carolina has a similar residency test to Georgia.¹⁵⁷ North Carolina's statute indicates that the "absence of an individual from the state for more than 183 days raises no presumption that the individual is not a resident."¹⁵⁸ Texas defines a resident for tax purposes as anyone who lives in the state, even if temporarily, and clarifies in the Texas Administrative Code that a person may be a resident of more than one state at a time.¹⁵⁹ Thus, it is possible for an individual to be a resident both in California and Texas for state income tax purposes.¹⁶⁰

States also vary in how they tax their residents. Seven states, Alaska, Florida, Nevada, South Dakota, Tennessee, Texas, and Wyoming do not have state income taxes.¹⁶¹ New Hampshire and Washington impose taxes only on certain types of income such as interest and dividend income or the capital gains of high earners.¹⁶² Additionally, states that do impose an income tax vary in their rates. Rates can be as high as 12.3% in California and as low as 2.9% in North Dakota.¹⁶³

Knowing state tax rules is important for student-athletes earning compensation from the use of their NIL.¹⁶⁴ If a student-athlete goes to college out of state, they will need to be aware of the residency requirements and state income taxes of both their home state and the state in which they attend college to determine where they must pay taxes and how much they must pay.¹⁶⁵ If a student-

¹⁵⁵ Cal. Code Regs. tit. 18, § 17014(a) (stating that under this definition "an individual may be a resident although not domiciled in this State, and, conversely, may be domiciled in this State without being a resident.").

¹⁵⁷ Ga. Code Ann. § 48-7-1(10)(A)(iii).

¹⁵⁷ N.C. Gen. Stat. Ann. § 105-153.3(15) ("...an individual who is present within the State for more than 183 days during the taxable year is presumed to be a resident...").

¹⁵⁸ *Id.*

¹⁵⁹ 34 Tex. Admin. Code § 3.71(a).

¹⁶⁰ Ritter, *supra* note 28, at 434.

¹⁶¹ Janet Berry-Johnson & Rose Wheeler, *9 States With No Income Tax*, Forbes Advisor (June 14, 2023), <https://www.forbes.com/advisor/taxes/states-with-no-income-tax/>.

¹⁶² *Id.*

¹⁶³ Sabrina Parys & Tina Orem, *2022-2023 State Income Tax Rates: What They Are, How They Work*, NerdWallet (Jul. 19, 2023), <https://www.nerdwallet.com/article/taxes/state-income-tax-rates>.

¹⁶⁴ Kisska-Schulze & Epstein, *supra* note 41, at 496.

¹⁶⁵ Ritter, *supra* note 28, at 434.

athlete is found to be a resident of both states, they must file an income tax return in both states and ascertain whether there are any available tax credits they qualify for in each state.¹⁶⁶

In addition, even if a student-athlete goes to college in their home state, they will still have to comply with multiple state income tax laws and tax filings if they go outside of their home state to earn NIL income.¹⁶⁷ If a state imposes an income tax, the student-athlete's state of residence will tax the athlete's income from all sources while nonresident states can tax a portion of the athlete's NIL earnings.¹⁶⁸

Characterization of income

The characterization of NIL income influences how and where student-athletes will incur taxes on their income. If NIL income is deemed compensation for services, then the income will be taxed where the services were rendered.¹⁶⁹ If NIL income is considered royalties, then the income will be taxed where the student-athlete is considered a resident.¹⁷⁰ Because of the NCAA's reluctance to adopt a pay-for-play model and consider student-athletes employees, the NIL income of student-athletes will likely be classified as royalties and will be taxed according to the student-athlete's state of residence.¹⁷¹

The Kiddie Tax

Student-athletes should be aware of the "kiddie tax" under Section 1(g).¹⁷² The kiddie tax applies to minors who have not attained the age of 18 before the close of the taxable year or to full-time students under the age of 24 whose earned income does not exceed half of their annual support expenses.¹⁷³ Annual support expenses include all amounts spent to provide the child

¹⁶⁶ *Id.*

¹⁶⁷ *Name, Image, and Likeness, Income Paid to Student-Athletes Is Taxable Income*, Taxpayer Advocate Service (Mar. 7, 2023), <https://www.taxpayeradvocate.irs.gov/get-help/general/nil/#:~:text=A%20student%2Dathlete%20who%20files,the%20standard%20deduction%20for%202022.>

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 435.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² I.R.C. § 1(g).

with food, lodging, clothing, education, medical and dental care, recreation, transportation, and similar necessities.¹⁷⁴

If the child's unearned income is more than the designated threshold for the taxable year, then the unearned income above that threshold is taxed at the parent's marginal tax rate if the parent's rate is higher than the child's.¹⁷⁵ Unearned income is generally all income other than salaries, wages, and other amounts received as pay for work actually performed such as taxable interest, dividends, capital gains, royalties, and certain taxable scholarships.¹⁷⁶

If student-athletes earn royalties from the use of their NIL, the royalties will be unearned income unless they receive them as part of a trade or business.¹⁷⁷ If the kiddie tax applies, this income will face taxation at the kiddie tax level up until the threshold amount, and anything exceeding that threshold will incur taxation at the tax rate of the student-athlete's parents. Student-athletes will report the kiddie tax on Form 8615 attached to the student-athlete's Form 1040 and must include their parent's taxpayer identification number.¹⁷⁸

Student-athletes, especially those from high-income producing families, should inquire about the applicability of this provision.¹⁷⁹

Potential Tax Penalties

Student-athletes may incur penalties if they do not follow federal tax rules related to their NIL income. The IRS uses tax penalties to enforce and promote compliance with federal tax rules.¹⁸⁰ These penalties can result in monetary fines and jail sentences.

¹⁷³ *Id.*; *Instructions for Form 8615*, IRS (Nov. 15, 2022), <https://www.irs.gov/pub/irs-pdf/i8615.pdf>.

¹⁷⁴ *Instructions for Form 8615*, IRS (Nov. 15, 2022), <https://www.irs.gov/pub/irs-pdf/i8615.pdf>.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Carlos J. Hornbrook, *Student Athletes Need to Know the Potential Tax Implications of the Name, Image, Likeness Rules in College Football*, ABA (June 11, 2023), https://www.americanbar.org/groups/taxation/publications/abataxtimes_home/23spr/23spr-prp-hornbrook-nil-rules/.

¹⁷⁸ *Kiddie Tax*, Thomas Reuters, <https://tax.thomsonreuters.com/en/glossary/kiddie-tax> (last updated Jan. 10, 2022).

¹⁷⁹ Hornbrook, *supra* note 177.

¹⁸¹ Fines are generally monetarily stiff and non-negotiable.¹⁸² A few examples of violations may include not paying or underpaying taxes; not timely filing their quarterly estimated tax payments each quarter when due; and failure to file an accurate return.¹⁸³

Student-athletes can also face state consequences if they do not file or fail to pay their state taxes. For example, Louisiana can revoke driving privileges if a taxpayer owes the state more than \$1,000 in state income tax.¹⁸⁴

Civil and criminal fraud penalties may also apply to student-athletes who fail to report their NIL income correctly and pay taxes on them.¹⁸⁵

III. RECOMMENDATIONS

The new NIL rules coupled with the fact that many high schoolers have had little-to-no financial education prior to enrolling in college creates student-athletes with no general understanding of how the tax system works. The tax complexities of earning NIL income may be overwhelming for student-athletes and can result in audits, penalties, and jail-time for some.

This paper offers recommendations to the Treasury that will provide uniformity to student-athletes' tax filings. This paper also recommends certain actions for the NCAA and its member institutions to implement to better educate student-athletes on their tax liability.

Recommendations to the Treasury

First, the Treasury should issue a revenue ruling deciding that a student-athlete's principal place of business and tax home for federal tax purposes is the city of their college or university, not where they reside outside of the school year. Unlike professional athletes, student-athletes do not reside in the city of their college or university for profit-making or tax-saving purposes nor do they attend their school for the specific purpose of making a profit.

¹⁸⁰ Messina & Messina, *supra* note 65, at 194.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ La. Stat. Ann. § 47:269.2.

¹⁸⁵ Messina & Messina, *supra* note 65, at 194.

Student-athletes attend a college or university for the primary purpose of pursuing a college degree and playing amateur athletics. Nevertheless, student-athletes reside most of the year in the location of the college or university for which they play for, and their NIL deals are based on their NIL as a collegiate athlete. Student-athletes would not earn compensation for the use of their NIL if it were not for their participation in collegiate sports at their college or university. Additionally, many student-athletes, to fulfill the obligations of their NIL contracts, perform services in or around the location of their college or university.¹⁸⁶ Thus, earning compensation from their NIL is directly related to playing collegiate sports at the location of their college or university, and this ruling would preserve the IRS's approach that a tax home for federal tax purposes is the location of the taxpayer's principal place of business.

Fixing a student-athlete's tax home as the location of their college or university can prevent later tax complications. For student-athletes who have both a family home in which they live during the summer months or school-designated breaks and a home located near their college or university in which they reside during the academic year, designating a tax home can be difficult. A ruling fixing a student-athlete's tax home to their college or university would provide uniformity in determining the tax homes of student-athletes rather than analyzing each student-athlete's tax home on a case-by-case basis. This ruling would also allow student-athletes to deduct ordinary and necessary trade or business expenses relating to their travel for the purpose of

¹⁸⁶ See generally Meghan Overdeep, *Stetson Bennett Celebrates National Championship Win by Working at Raising Cane's... Again!*, Southern Living (Jan. 13, 2023), <https://www.southernliving.com/culture/activities-and-entertainment/sports/stetson-bennett-works-at-raising-can-es-following-national-championship-win> (showing Stetson Bennett, former University of Georgia quarterback, working at the Cane's chicken finger restaurant in Athens, GA, the location of the University of Georgia, as part of an NIL deal); Chandler Vessels, *WATCH: Athens Apartment Unveils 'Mailman' Commercial With Georgia QB Stetson Bennett*, On3 (Aug. 30, 2022), <https://www.on3.com/college/georgia-bulldogs/news/athens-apartment-unveils-mailman-commercial-with-georgia-qb-stetson-bennett-nil-hillpointe/>; Mark Bechtel, *College Athletes Cashed in on Food-Related NIL Deals in 2022*, Sports Illustrated (Dec. 15, 2022), <https://www.si.com/college/2022/12/15/college-athletes-top-food-related-nil-deals-2022> (describing Kentucky quarterback Will Levis and his NIL deal with Ale-8, a locally sold Kentucky soft drink).

completing or contracting NIL deals outside the location of their academic institution.

Second, the Treasury should issue a separate ruling stating that student-athletes earning compensation for the use of their NIL are doing so to make a profit, not as a hobby. This ruling would provide additional uniformity in deciding whether student-athletes are carrying on a trade or business and would rule out any question on whether their NIL deals constitute a hobby. It would also provide some clarification on the applicability of the Kiddie Tax on student-athletes. This ruling would align with the NCAA's interim policy that student-athletes should be able to profit from the use of their NIL.

Recommendations to the NCAA and Member Institutions

College Course on Student-Athlete Tax Liabilities

Some student-athletes may not need to file a tax return, but others making money from NIL will need to learn fast and thoroughly. NCAA member institutions should offer a financial literacy course for student-athletes that explains the tax implications of earning NIL income both on the state and federal income tax levels.

The learning outcomes of this course should be for student-athletes to gain: (1) a basic understanding of the U.S. tax system as it applies to collegiate athletes conducting business in the U.S. through the use of their NIL income; (2) familiarity with sections of the Internal Revenue Code, state law, and treasury regulations relevant to analysis of the tax treatment of NIL income; and (3) ability to apply the U.S. federal and state income tax law to common transactions and activities of student-athletes.

To accomplish this, the course material should include topics such as: (1) when to file an income tax return; (2) who needs to file an income tax return; (3) available tax benefits to student-athletes such as applicable exclusions and deductions; (4) the self-employment tax; (5) what is includible in a student-athlete's gross income; and (6) state income tax requirements including how a student-athlete determines his or her tax home.

CPAs or tax lawyers should teach this course. Institutions should structure the course to teach and test on tax planning

strategies and the calculation of taxes for student-athlete NIL income. Classes should include both a lecture covering the substantive law as applicable to student-athletes and a period for analyzing and discussing exemplary problems or situations. A method of testing understanding could be assigning a comprehensive tax return to student-athletes that incorporates many of the skills and lessons they learned over the course of the semester and allows them to practice reporting NIL income.

The course should be a semester-long class, a part of the student-athlete curriculum, offered every semester, taken for credit, and includible in a student-athlete's hour requirement for graduation. Member institutions should audit and restructure the course every year, or as necessary, to reflect any changes in the applicable tax law or NIL laws, policies, or regulations.

Tax Support Personnel

NCAA member institutions should establish a department responsible for providing tax, accounting, or financial advice to student-athletes to help address the complicated tax implications of earning NIL income. The department should employ financial advisors, CPAs, and/or attorneys specializing in tax. This department should offer tax resources for student-athletes such as tax preparation assistance, tax planning guidance, and support when filing federal and state quarterly tax payments and any other tax obligations.

The role of attorneys in this department would be to advise student-athletes of their tax obligations and liabilities from their NIL income, form any LLCs or corporations as a tax-minimization technique,¹⁸⁷ and defend student-athletes in any tax controversy or litigation. CPAs could track student-athlete expenses, calculate the quarterly estimated payments of student-athletes, and file tax returns.

Because many student-athletes may not understand or recognize their federal and state income tax obligations, tax personnel could provide a further level of support when analyzing

¹⁸⁷ *Tax Support*, United States Olympic & Paralympic Comm., <https://www.usopc.org/taxsupport> ("Incorporating can lead to more paperwork and more complex taxes but can potentially help you claim some extra tax breaks.").

and satisfying their tax obligations from the receipt of NIL income. More importantly, tax personnel can also make great educators for student-athletes who need improvement in their tax literacy.¹⁸⁸

Online Tax Platform

The NCAA should develop an eLearning platform for tax education for their member institutions to administer to its student-athletes, like those provided to inform on sexual harassment or hazing.¹⁸⁹ The NCAA should provide this online education program in the context of student-athlete NIL income and include explanations of the applicable implications and filing requirements. The platform can incorporate “how-to” pages and instructional videos on topics such as how to fill out a tax return, how to track NIL income and expenses, and how to know if a specific deduction or exclusion from income applies to the student-athlete user.

These platforms should be free to student-athletes during their academic career and available year-round. NCAA member institutions should require their student-athletes to take this course once a year to refresh the student-athletes’ knowledge on tax matters and how it affects their NIL income. Student-athletes should complete the course prior to tax-filing day.

Law School Partnerships

It is indisputable that some student-athletes will now need access to affordable and competent representation to confront their newfound NIL earnings. To fulfill this need, NCAA member institutions should partner with law school tax clinics to offer pro bono tax and contract advice to student-athletes. Many NCAA member institutions have law schools on their campus with students that are learning about tax law that can provide student-athletes with tax law advice free of cost to the student-athlete.

¹⁸⁸ Joe Lizcano, *The New Game Plan for Student-Athlete Success in the Name, Image, and Likeness Era: The Individual Student-Athlete Retirement Account*, 15 Est. Plan. & Cmty. Prop. L.J. 409, 425 (2023).

¹⁸⁹ See generally *Sexual Assault Prevention Training for Student-Athletes*, Vector Solutions, <https://www.vectorsolutions.com/solutions/vector-lms/higher-education/sexual-assault-prevention-training-student-athletes-course/> (last visited Oct. 17, 2023).

Law students can help clarify to the student-athletes the tax implications of their NIL deals and potential legal consequences to not filing correctly or on time. These services could be available to student-athletes who cannot afford tax-planning resources, need more complex legal advice, or need defense in an audit. The program would both benefit the law-students' education and the student-athlete.

Thresholds to Implementation

A barrier to enacting these solutions is that currently, under the NCAA's NIL interim policy, member institutions cannot provide free services such as tax preparation or contract review to student-athletes unless those services are available to the general student body.¹⁹⁰ Because of the potential complexities in the tax implications of NIL activities, the NCAA should rescind these guidelines and encourage and allow member institutions to assist student-athletes in their tax preparation and education.

The mission of the NCAA is to "[p]rovide a world-class athletics and academic experience for student-athletes that fosters lifelong well-being."¹⁹¹ To accomplish this, one of the NCAA's priorities is to "[c]reate programs that support outstanding performance on and off the field."¹⁹²

Fostering the tax literacy of student-athletes would set student-athletes up for lifelong success off the field and allow student-athletes to flourish financially and athletically without fear of tax penalties. Preventing the assistance of NCAA member institutions sets student-athletes up for tax-filing failure and subjects them to potential tax sanctions. It would not further their performance on and off the field nor would it foster the lifelong well-being of student-athletes.

¹⁹⁰ Meghan Durham, *DI Board Approves Clarifications for Interim NIL Policy*, NCAA (Oct. 26, 2022), <https://www.ncaa.org/news/2022/10/26/media-center-di-board-approves-clarifications-for-interim-nil-policy.aspx#:~:text=Schools%20cannot%2C%20under%20the%20interim,student%20athletes%20to%20support%20NIL>.

¹⁹¹ *Mission and Priorities*, NCAA, <https://www.ncaa.org/sports/2021/6/28/mission-and-priorities.aspx> (last visited Nov. 14, 2023).

¹⁹² *Id.*

CONCLUSION

Taxes can be complicated, and many student-athletes are currently not prepared to deal with the advanced tax filings that come with earning NIL income. Solutions are necessary to assist student-athletes with their tax compliance and help them responsibly file their taxes and avoid penalties. The IRS, NCAA, and NCAA member institutions should implement certain measures to ensure uniformity and provide clarity as to the tax implications of student-athletes that earn NIL income. These measures include providing tax literacy resources to student-athletes to better educate them on the Code, allowing NCAA member institutions to provide tax preparation assistance to student-athletes, and the IRS issuing rulings to answer some questions as to how student-athletes should file their taxes. The better a student-athlete understands their tax obligations and tax-planning options, both on the state and federal level, the more likely they will continue to compete in sport, find financial stability, and avoid tax penalties amidst the changing NIL landscape.