Essay

Navigating College Athlete Endorsements Around School Sponsorships

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INTRODUCTION

College sports are a big business. This is especially true when it comes to NCAA Division 1 athletic department sponsorships. The six largest apparel deals are: (1) UCLA's 15-year, $280 million Under Armour agreement; (2) Ohio State's 15-year, $252 million contract with Nike; (3) Texas' 15-year, $250 million Nike deal; (4) Kansas' 14-year, $191 million pact with Adidas; (5) Michigan's 15-year, $173.8 million Nike relationship; and (6) Louisville's 10-year, $160 million union with Adidas.[1] Essentially, sportswear companies like Adidas, Nike, and Under Armour give athletic departments astronomical amounts of cash and goods. In exchange, those schools' NCAA Division 1 teams use the relevant sponsor's apparel and equipment at practice and during games. This arrangement benefits both parties. Sportswear companies get intense national exposure when partner colleges appear in the news and play on television. Schools get cash and mountains of free gear that serve as a powerful recruiting tool while chasing elite high school prospects.[2]

This thriving ecosystem of lucrative school sponsorships is now threatened. In 2019 and 2020, California, Colorado, Florida, Nebraska,

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1. *Breaking Down College Shoe and Apparel Deals*, ESPN (Sept. 27, 2017), https://www.espn.com/mens-college-basketball/story/_/id/20837463/a-look-colleges-apparel-shoe-deals [https://perma.cc/KS6R-UB4Z].

2. Steve Jones, *Analysis: Nike Schools Land Most Top Basketball Recruits*, LOUISVILLE COURIER-JOURNAL (Oct. 20, 2014), https://www.indystar.com/story/sports/college/indiana/2014/10/20/analysis-nike-schools-land-most-top-recruits/17463981/ [https://perma.cc/E9XS-N7LU].

and New Jersey passed laws authorizing individual college athletes to profit from their name, image, and likeness.[3] Similar measures have been proposed by dozens of state legislatures.[4] Meanwhile, the NCAA proposed rule changes enabling "student-athletes to receive compensation for third-party endorsements both related to and separate from athletics."[5] The NCAA is expected to implement these new rules by January 2021, moving into what University of California System president and NCAA Board of Governors chairman Michael V. Drake called the "uncharted territory" of "allowing promotions and third-party endorsements."[6] The NCAA has not yet addressed potential conflicts between college athlete endorsements and universities' existing sponsorship deals.[7] But the new name, image, and likeness statutes passed by California, Colorado, Florida, Nebraska, and New Jersey forbid college athletes from accepting any outside partnerships that conflict

3. *See* Collegiate Athletics: Student Athlete Compensation and Representation, S.B. 206, 2019 Leg. (Cal. 2019); Compensation and Representation of Student-Athletes, S.B. 20-123, 72d Gen. Assemb., 2d Reg. Sess. (Colo. 2020); Intercollegiate Athlete Compensation and Rights, S.B. 646 (Fla. 2020); Nebraska Fair Pay to Play Act, L.B. 962, 106th Leg., 2d Sess. (Neb. 2020); New Jersey Fair Play Act, S. No. 971, 219th Leg. (N.J. 2020); Steven A. Bank, *The Olympic-Sized Loophole in California's Fair Pay to Play Act*, 120 COLUM. L. REV. F. 4 (2020); David Furones, *Florida Gov. Ron DeSantis signs bill that allows college athletes to earn endorsements*, S. FLA. SUN-SENTINEL (June 12, 2020), https://www.sun-sentinel.com/sports/miami-hurricanes/fl-sp-desantis-ncaa-name-image-likeness-20200612-sklikkmwnvaujhjo2767q3v3ym-story.html [https://perma.cc/H8PM-JQTM] (describing Florida's college athlete compensation law); Demetrius Harvey, *Signed Into Law: Florida to Allow College Athletes to Make Money for NIL*, SPORTS ILLUSTRATED (June 12, 2020), https://www.si.com/college/florida/football/florida-governor-signs-law-allow-college-athletes-compensation-nil [https://perma.cc/F2AH-ZV2P] (analyzing the Florida statute); Kelly Lyell & Steve Berkowitz, *Colorado Bill Allowing College Athletes to be Paid Passes Both Houses of Legislature*, COLORADOAN (Mar. 5, 2020), https://www.coloradoan.com/story/sports/college/2020/03/04/colorado-legislature-passes-bill-allowing-athletes-compensated-name-image-likeness/4956055002/ [https://perma.cc/8V9E-VACZ].

4. See Lyell & Berkowitz, *supra* note 3.

5. *Board of Governors Moves Toward Allowing Student-Athlete Compensation for Endorsements and Promotions*, NCAA (April 29, 2020), http://www.ncaa.org/about/resources/media-center/news/board-governors-moves-toward-allowing-student-athlete-compensation-endorsements-and-promotions [https://perma.cc/28LR-YDVJ] [hereinafter *Board of Governors*].

6. *Id*. (internal quotation marks omitted). Michael V. Drake was Ohio State's president emeritus at the time the NCAA Board of Governors issued its recommendations on name, image, and likeness. He joined the University of California System in early July. *See generally* Shawn Hubler & Jill Cowan, *Meet the New Leader of the University of California*, N.Y. TIMES (July 8, 2020), https://www.nytimes.com/2020/07/08/us/new-university-california-president-michael-drake.html [https://perma.cc/L2DM-M8LL].

7. *Board of Governors*, *supra* note 5.

with the terms of athletic department sponsorships.[8] States that follow these five jurisdictions may even attempt to retroactively ban clashing college athlete endorsements after such pacts are signed.

This essay addresses the legal implications stemming from this emerging potential for college athlete endorsements that conflict with university partnerships.[9] Part I establishes that some state laws that retroactively restrict college athletes' third-party sponsorships may violate the federal Constitution's Contracts Clause.[10] Part II lays out the stakes, recognizing that school sponsors derive major intrinsic value from the fact that millions will see star college athletes using their gear in big games and on personal social media accounts that accrue countless followers.[11] The fact that college athletes may soon be able to solicit several endorsement offers and accept financially superior deals with university partner rivals poses a threat to the value that college sponsors derive from their school-level agreements. For example, Nike does not want to enter a major partnership with LSU, only to see LSU's most visible athletes endorsing Adidas. Under these circumstances, Part II also explains that college sponsors could ground breach of contract lawsuits against schools in college athlete promotion of competitors. Universities may find it difficult to stop stars from working with their partners' rivals, but they must protect institution-level deals. Part III argues that the solution is deceptively simple. Colleges can manage this new conflicting endorsement problem by signing independent contractor agreements with athletes who secure outside partnerships and employing all other players at will. Because employers do not control independent contractors, star college athletes will be free to sign market-value sponsorships and schools will be insulated from breach of contract suits.

8. *See supra* note 3 and accompanying text.

9. For this essay's purposes, a "conflicting endorsement" is an athlete's partnership with any company other than that athlete's school sponsors, even if that partner is not normally considered a direct competitor of the university sponsor.

10. U.S. CONST. art. 1, § 10, cl. 1.

11. Examples of this "promotional phenomenon" abound throughout college athletes' social media accounts. *See, e.g.*, JaMarr Chase (@lahjay10_), INSTAGRAM (Sept. 23, 2019), https://www.instagram.com/p/B2wl4bphLRy/ [https://perma.cc/Z85U-P7SQ] (LSU football player wearing Nike uniform and equipment during a game); Patrick Queen (@pqueen.8), INSTAGRAM (Aug. 1, 2019), https://www.instagram.com/p/B0obx8_HPbx/ [https://perma.cc/D39F-H7GG] (LSU football player kissing Nike shoe during opening day of training camp). *See also* Mark Heim, *Top 18 Most Popular College Football Players on Social Media Include Alabama Stars*, ADVANCE LOCAL (Aug. 20, 2019), https://www.al.com/sports/g66l-2019/08/c5db3a36df3467/top-18-most-popular-college-football-players-on-social-media-include-alabama-stars-.html [https://perma.cc/CV3T-YT9Y].

I. THE CONTRACTS CLAUSE PROBLEM

A. STATE LAWS RESTRICTING COLLEGE ATHLETE PARTNERSHIPS

At first glance, the new state laws passed by California, Colorado, Florida, Nebraska and New Jersey solve the issues raised by college athletes signing endorsement deals with school partner rivals. They ban college athletes from entering into contracts that conflict with university sponsorships. But athletic department-wide endorsements only apply to team activities,[12] so these new state laws may let players partner with college sponsor competitors in their personal capacity. And if state statutory prohibitions on conflicting partnerships take effect *after* college athletes accept endorsements, they may violate the federal Constitution's Contracts Clause.

In general, the Contracts Clause protects pacts that are signed *before* a state law takes effect.[13] It "restricts the power of States to disrupt contractual arrangements," and "applies to any kind of contract."[14] And "not all laws affecting pre-existing contracts violate the Clause."[15] A two-part test is used for this analysis. The first criteria is "whether the state law has 'operated as a substantial impairment of a contractual relationship.'"[16] Courts evaluate "the extent to which the law undermines the contractual bargain, interferes with [any] party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights."[17] Second, if these "factors show a substantial impairment, the inquiry turns to the means and ends of the legislation[, or] whether [a] state law is drawn in an 'appropriate' and 'reasonable' way to advance a 'significant and legitimate public purpose.'"[18] In other words, the relevant state statute must be narrowly tailored to its purpose to pass muster under the Contracts Clause.

If a state statute banning college athlete endorsement deals that conflict with school partnerships takes effect after agreements are signed, it may violate the federal Constitution's Contracts Clause. The first test will be whether the applicable state law substantially impairs college athletes' outside sponsorships. Contracts Clause issues will not

12. *See, e.g.*, Bank, *supra* note 3.
13. *See generally* Ogden v. Saunders, 25 U.S. 213 (1827).
14. Sveen v. Melin, 138 S. Ct. 1815, 1821 (2018).
15. *Id.* (citing El Paso v. Simmons, 379 U.S. 497, 506–07 (1965)).
16. *Id.* at 1821–22.
17. *Id.* at 1822 (citing, among other cases, Texaco, Inc. v. Short, 454 U.S. 516, 531 (1982)).
18. *Id.* (citing Energy Reserves Grp., Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411–12 (1983)).

emerge if the state statute exempts college athletes' pre-existing third-party endorsements. Otherwise, courts will inquire further. One problem with state laws that retroactively forbid college athletes from fulfilling "conflicting deals" is that they may destroy contractual bargains between players and their chosen endorsees. Instead of a planned exchange of social influence and visibility for money, each party gets nothing. Such a drastic change will interfere with both parties' rational expectations for their arrangement. And, if college athletes' conflicting third-party partnerships are voided for illegality, neither party would be able to safeguard or reinstate their lost contractual privileges. Because a substantial impairment may occur in such situations, courts will likely tackle the second Contract Clause element.

This follow-up test asks if "a significant and legitimate public purpose" inspired the state law. Notably, the six biggest collegiate sportswear contracts all belong to public universities. And schools' lucrative apparel sponsorships serve several key functions. First, they are a major income stream that helps cover direct costs like coaches' salaries, facilities, and scholarships.[19] Second, as few athletic departments are self-sufficient, every dollar of revenue reduces financial burdens on parent schools, which can allocate funds elsewhere. Third, they simplify operations by offering a single source of goods for all teams. Fourth, membership in a sportswear company's pantheon of partner schools facilitates marketing opportunities for athletic departments. Finally, association with prominent apparel manufacturers helps coaches recruit elite high school prospects, which is critical to success.[20] Preservation of these benefits is a "significant and legitimate public purpose," so judges will have to assess whether relevant statutes are "appropriately and reasonably drawn" in addressing Contracts Clause issues raised as a result of state college athlete compensation laws.

Here, the real issue is whether the state law is narrowly tailored to its purpose of protecting athletic department contracts.[21]

19. At schools with profitable athletic departments, like Ohio State, the parent institution submits an invoice for the total dollar amount of scholarships awarded, then athletics cuts a check to the school. *See* Rich Exner, *Ohio State's Athletic Department is one of Few Nationally Able to Pay its Own Bills*, ADVANCE LOCAL (Jan. 12, 2019), https://www.cleveland.com/datacentral/2011/10/ohio_states_athletic_departmen.html [https://perma.cc/C3XS-E4LY].

20. Andy Wittry, *Analyzing College Football's Relationship Between Recruiting Class Rankings and Wins*, STADIUM (July 2, 2019), https://watchstadium.com/analyzing-college-footballs-relationship-between-recruiting-class-rankings-and-wins-07-01 [https://perma.cc/38K5-M2GN].

21. *See generally* United States Trust Co. v. New Jersey, 431 U.S. 1, 25–32 (1977).

Draconian statutes prohibiting *all* college athlete endorsements of school sponsor rivals, even pre-existing ones, are substantial impairments that should fail the "narrowly tailored" test. Under such regimes, college athletes could only negotiate with a fixed group of companies on a "take it or leave it" basis, causing income suppression. This clashes with the objective of NCAA name, image, and likeness rules—letting college athletes realize their market value. Also, school sportswear partnerships only cover official team activities, like practices, games, and media duties.[22] These sponsorships do not govern things done in college athletes' personal capacities.[23] For example, Clemson's Nike contract cannot stop Trevor Lawrence, the team's star quarterback, from wearing an Adidas shirt and a pair of Adidas Ultraboost sneakers in vacation Instagrams.[24] Since laws that essentially force college athletes to endorse school partners far exceed what is necessary to protect such sponsorships, state statutes must take a more moderate approach.

State laws requiring college athletes to honor all the terms of school endorsement deals, but letting players sell third-party partnerships covering their personal capacities to the highest bidder, and preserving such agreements, are another matter. These statutes will only substantially impair pacts that oblige college athletes to promote school sponsor rivals during official team activities. And, because they use existing official and personal capacity distinctions, such laws accommodate schools' desire to protect their lucrative sportswear endorsements. These statutes will also facilitate the NCAA's efforts to allow college athletes to monetize themselves. Hence, they are narrowly tailored to the significant and legitimate public purpose of preserving school partnerships. But it can be challenging to differentiate college athletes' official and personal capacities. If, during his time as LSU's star quarterback, Joe Burrow posted an Instagram promoting Adidas from a College Football Playoff hotel room despite playing for a Nike school, would he be acting on his own behalf, or participating in a team activity where he had to promote Nike? College athletic departments will have to successfully navigate such situations in the near future.

22. *See generally* Bank, *supra* note 3.

23. *Id*.

24. Far from being an abstract hypothetical, this scenario has actually occurred. *See, e.g.*, Trevor Lawrence (@TLawrence16), INSTAGRAM (May 23, 2019), https://www.instagram.com/p/Bx0VJzklCJ-/ [https://perma.cc/HC8Y-C35A] (wearing privately owned Adidas apparel while away from the Clemson football team).

B. LIMITS ON POSSIBLE STATE UNIVERSITY CANCELLATION OF CONFLICTING ATHLETE ENDORSEMENTS

Irrespective of state laws, can public universities just retroactively terminate college athletes' pre-existing agreements with school sponsor rivals? Maybe not. State universities are public entities bound by the federal Constitution, inclusive of the Contracts Clause.[25] That edict forbids states from passing any "[l]aw impairing the [o]bligation of [c]ontracts."[26] Such laws can include administrative regulations.[27] Because public schools' athletic departments control every aspect of their university's participation in college sports, they are arguably state administrative agencies in disguise.[28] Their directives, including those blocking college athletes from endorsing any school partner rivals, can be considered administrative regulations having the force and operation of law. It is no accident that employee dismissals pursuant to public universities' internal policies often follow the same appeals process used when state administrative agencies terminate staff.[29] If so, state sovereign immunity is not a get-out-of-jail-free card.[30] Since federal constitutional rights would be at stake, any college athletes affected by cancellation of outside sponsorships could use *Ex Parte Young* to secure prospective injunctive relief against implementing athletic department officials.[31]

Regardless, public colleges may wish to avoid revoking player endorsements of school partner competitors for several practical reasons. If universities unilaterally cancel college athletes' outside deals with sponsor rivals, their players will only be able to negotiate with the college's endorsees. College athletes' inability to solicit competing offers from rival businesses would artificially suppress their income. This limitation on potential name, image, and likeness earnings

25. *See generally* Grutter v. Bollinger, 539 U.S. 306 (2003).

26. U.S. CONST. art. 1, § 10, cl. 1.

27. *See* Appleby v. Delaney, 271 U.S. 403 (1926); Grand Trunk Ry. v. Indiana R.R. Comm'n, 221 U.S. 400 (1911).

28. However, some states explicitly exempt public university components from their definition of "administrative agencies." *See, e.g.*, Kerr v. Bd. of Regents of the Univ. of Nebraska, 739 N.W.2d 224 (Neb. Ct. App. 2007).

29. *See* Arishi v. Washington State Univ., 385 P.3d 251 (Wash. Ct. App. 2016); Liu v. Portland State Univ., 383 P.3d 294 (Or. Ct. App. 2016); Frazier v. North Carolina Central Univ., 779 S.E.2d 515 (N.C. Ct. App. 2015).

30. *See generally* Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).

31. Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913) (ruling that unconstitutional acts by state officials are "state action"); Ex Parte Young, 209 U.S. 123 (1908) (treating unconstitutional acts of state officials as individual, rather than state, undertakings to circumvent Eleventh Amendment state sovereign immunity).

directly contradicts the NCAA's vision of college athletes signing market-value partnerships. And the NCAA harshly punishes schools that ignore its rules.[32] Besides, any university that limits its athletes' sponsor options will be at a significant recruiting disadvantage relative to colleges otherwise inclined. Absent extenuating circumstances, or a lack of other offers, prospects will actively avoid schools that curb college athletes' earning power to a greater extent than their competitors. Because recruiting success is critical to winning games, no university will voluntarily impose this barrier to success unless it prioritizes other goals, such as student-athlete academic performance.

C. PRIVATE SCHOOLS AND NCAA ENDORSEMENT REGULATION

Private colleges are usually not subject to constitutional restraints like the Contracts Clause since the state-action doctrine rarely applies to them.[33] However, they might not be able to, or even want to, exploit this loophole to void player deals with school sponsor rivals for several reasons. First, the NCAA would sanction private universities that violate its new compensation regulations. Second, public colleges would emphasize that the ability to cancel athlete endorsements of school partner rivals would give private schools a major negotiating advantage with potential sponsors. For instance, why would Nike collaborate with the University of Virginia, which may not be able to stop its players from marketing Adidas, when it could work with a Duke athletic department unfettered by such restrictions? Because some of the NCAA's most powerful members, such as Ohio State, are public universities, the NCAA will make sure private colleges do not have a competitive advantage over public schools. Third, if state universities leave conflicting athlete endorsements alone, private colleges will not terminate such deals because that would put them at a recruiting disadvantage to their public "cousins."

D. FEDERAL PREEMPTION OF STATE COLLEGE ATHLETE LAWS

Some commentators persuasively argue that Congress should preempt state student-athlete compensation regimes.[34] But Contracts

32. Matt Hinton, *Setting the Bar: Harshest NCAA Precedents For 'Unprecedented' Move Against Penn State*, CBS SPORTS (July 22, 2012), https://www.cbssports.com/college-football/news/setting-the-bar-harshest-ncaa-precedents-for-unprecedented-move-against-penn-state/ [https://perma.cc/4PPL-L43D].

33. Gowri Ramachandran, *Private Institutions, Social Responsibility, and the State Action Doctrine*, 96 TEX. L. REV. ONLINE (2018).

34. Justin Aimonetti & Christian Talley, *Game Changer: Why and How Congress*

Clause issues remain unexplored in this context. Since the Contracts Clause is inapplicable to the federal government,[35] Congress can pass a statute banning college athletes from signing agreements with school sponsor rivals, and terminating such deals, without worrying about constitutional violations. Yet, prospective bills that would affect the 2021–2022 school year stalled due to COVID-19, and lawmakers have only recently re-initiated preliminary discussions on college athlete compensation.[36]

Presently, Washington's appetite to legislate in the field of college athlete compensation appears to be meager at best. During hearings in September 2020, Utah State University athletic director John Hartwell told the United States Senate that, if college athletes were allowed to accept individual deals, footwear and apparel companies would reduce payments to partner universities.[37] And several senators expressed doubts about allowing college athletes to profit off their name, image, and likeness, with Senator Richard Burr calling a potential federal college athlete compensation law "a huge mistake."[38] Further, Senator Lamar Alexander, who ran track at Vanderbilt in the 1960s, insisted that he did "not see a good ending to allowing a few students to be paid by commercial interests while most of their teammates are not."[39] Senator Rand Paul argued, meanwhile, that Congress should avoid involving itself in college athlete compensation entirely, seeing any such move to do so as a "terrible, rotten, no good idea to federalize college sports."[40] Schools therefore should assume that patchwork state compensation regimes will govern when the NCAA's

Should Preempt State Student-Athlete Compensation Regimes, 72 STANFORD L. REV. ONLINE 28 (2019).

35. *See generally* United States v. May, 500 Fed. App'x 458, 465 (6th Cir. 2012).

36. *See generally* Megan Sauer, *Congress Considers College Athlete Compensation Following Florida Law*, TAMPA BAY TIMES (July 1, 2020), https://www.tampabay.com/florida-politics/buzz/2020/07/01/congress-considers-college-athlete-compensation-following-florida-law/ [https://perma.cc/6XGB-HPHH].

37. Dennis Romboy, *Sen. Mitt Romney Suggests Capping College Athlete Pay at $50k*, KSL.COM (Sept. 15, 2020), https://www.ksl.com/article/50017602/sen-mitt-romney-suggests-capping-college-athlete-pay-at-50k [https://perma.cc/23VZ-GSGQ] (quoting Hartwell as saying that there would be "a select few student-athletes who would be able to command those types of revenues and in all likelihood as it relates to a footwear and apparel company, they would diminish the amount they were providing to the institution . . . .").

38. *See* Ralph D. Russo, *North Carolina Senator Says Allowing College Athletes to Earn Money is 'Huge Mistake'*, SCRIPPS LOCAL MEDIA (Sept. 16, 2020), https://www.wtkr.com/sports/north-carolina-senator-says-allowing-college-athletes-to-earn-money-is-huge-mistake [https://perma.cc/Q48U-WZPN].

39. *Id*.

40. Romboy, *supra* note 37.

pending name, image, and likeness rules take effect in the 2021–2022 school year, and appraise themselves of related legal questions, lest a player's high-profile endorsement torpedo established university partnerships.

II. THE CONFLICTING SPONSORSHIP PROBLEM

College athletes will likely endorse the highest bidder for their promotional services. Legal issues will probably not materialize if college athletes partner with school sponsors. After all, Nike would be elated if an endorsement by star quarterback Justin Herbert preserved its brand uniformity across the Oregon football team. But problems may arise if a university partner competitor offers a college athlete superior financial terms, and the player accepts.

If state law lets athletes endorse college partner rivals during team activities, schools will have to reconcile such pacts with their own sponsorships. This is not an easy exercise as universities largely resist formal employment relationships with their athletes.[41] If women's basketball Player of the Year Sabrina Ionescu accepted an Adidas endorsement that involved wearing Adidas shoes while playing for Oregon, the university would be unable to stop her. A breach of contract suit based on Oregon's failure to exclusively promote Nike could result. Personal capacity partnerships that do not directly infringe on school sponsorships can also be problematic. Picture four-time women's basketball Final Four MVP Breanna Stewart posting Instagrams of herself wearing Puma gear in Times Square on a team trip to New York City despite playing for a UConn athletic department contracted to Nike. Is she acting in her official capacity as a UConn basketball player, or in her personal capacity? Difficulties in making these distinctions may invite litigation and show why colleges need to protect themselves.

III. THE INDEPENDENT CONTRACTOR SOLUTION

Colleges need to identify a legal mechanism capable of reconciling new NCAA directives letting athletes partner with the highest bidder for their name, image, and likeness with school sponsorships. The answer is straightforward: universities should abandon their

41. For example, when the Northwestern football team attempted to unionize in 2014, the school resisted. Northwestern defeated this collectivization effort in a National Labor Relations Board hearing. *See* Joe Nocera and Ben Strauss, *Fate of the Union: How Northwestern Football Union Nearly Came to Be*, SPORTS ILLUSTRATED (Feb. 24, 2016), https://www.si.com/college/2016/02/24/northwestern-union-case-book-indentured [https://perma.cc/A64K-VWZT].

resistance to formal employment relationships with college athletes and execute independent contractor agreements with star players who secure outside endorsements. Employers do not control how independent contractors do their jobs. Therefore, such arrangements will insulate athletic departments from breach of contract lawsuits alleging that someone under institutional control violated the terms of a sportswear partnership. However, not every player on a college sports team can obtain sponsorships, and schools have to accommodate these athletes as well. An employment-at-will regime may be the best way for universities to manage such players. Colleges should also consider some counterarguments that college athletes cannot be classified as independent contractors, which would mean that their players' third-party partnerships may violate the terms of school apparel deals.

A. NCAA ATHLETES CAN BE INDEPENDENT CONTRACTORS

"Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing."[42] Several standards fitting in four broad categories distinguish employees from independent contractors, and chosen inquiries vary by jurisdiction.[43] These analyses look at employer control over hired parties, where more power creates employees and less influence yields independent contractors.[44] Universities can credibly argue that sponsored college athletes are independent contractors, regardless of the standard used. Thus, it is unlikely that colleges that choose this way of navigating their athletes' conflicting third-party endorsements around school partnerships will be liable in derivative breach of contract lawsuits. But universities must nevertheless grasp how courts will approach this question if disgruntled sponsors take issue with a star player's endorsement of rival products and take the college to court over loss of marketing opportunities.[45]

42. N.L.R.B. v. Hearst Publ'ns, 322 U.S. 111, 121 (1944).

43. Dynamex Operations v. Super. Ct., 4 Cal. 5th 903, 950 n.20 (2018).

44. *Id*. (citing FedEx Home Delivery v. N.L.R.B., 563 F.3d 492, 497 (D.C. Cir. 2009)).

45. *See generally* Ben Bolch, *Under Armour Tells UCLA it Wants to End Deal With School*, LOS ANGELES TIMES (June 27, 2020), https://www.latimes.com/sports/ucla/story/2020-06-27/under-amour-informs-ucla-it-wants-to-terminate-deal-with-school [https://perma.cc/D55Q-U8V5].

1. The "Common-Law" Assessment

Common-law independent contractor identification mainly focuses on who really controls how a project is done,[46] or "the manner and means by which the product is accomplished."[47] Non-exclusive supplemental factors include (1) required skills; (2) tool sources; (3) where work is done; (4) length of the parties' relationship; (5) hirers' right to assign follow-up tasks; (6) hired parties' discretion over scheduling; (7) payment methods; (8) hired parties' selection and payment of any assistants; (9) whether the work aligns with the hiring party's general business activities; and (10) employee benefits and tax treatment.[48] Since "the common-law test contains 'no shorthand formula or magic phrase that can be applied to find the answer, all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.'"[49] This inquiry asks whether employer authority over hired parties is sufficient to classify the latter as employees.

College athletes with outside partnerships will have two jobs: (1) team obligations such as practices and games; and (2) sponsor duties like photo shoots. College athletes and their endorsees will manage all aspects of the latter. If star quarterback Tua Tagovailoa partnered with Adidas while on a Nike-sponsored Alabama football team, Crimson Tide coach Nick Saban would have no influence over that endorsement. Also, on-field success and marketing partnerships require different skills. One demands physical prowess, while the other stresses artistic skills and social media proficiency. In addition, the tools needed to fulfill sponsorships, like apparel, photos, and social media accounts, will be provided by college athletes and their endorsees. Further, college athletes will work with their partners off campus. For example, Nike often invites sponsored professional athletes to its Oregon headquarters, and would likely extend a similar courtesy to its college athlete endorsers.[50] And partnership terms will be up to college athletes, who can retain personal advisors to vet such conditions,[51] and their sponsors. Finally, apparel promotion is unrelated to

46. *Dynamex*, 4 Cal. 5th at 950 n.20.

47. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992).

48. *Id*. at 323–24.

49. *Id*. at 324 (citing N.L.R.B. v. United Ins. Co. of Am., 390 U.S. 254, 258 (1968)) (internal ellipses omitted).

50. *See generally* Jaime Candil, *Nike Grooming Kylian Mbappé as Their Next Global Superstar*, AS (June 17, 2019), https://en.as.com/en/2019/06/17/football/1560762330_501083.html [https://perma.cc/34PE-8CAF].

51. *See, e.g.*, Colo. S.B. 20-123, *supra* note 3.

schools' educational missions. Since universities will have no authority over their players' personal endorsements, such athletes can be independent contractors.

2. The "Economic Reality" Analysis

The economic reality analysis is used in Fair Labor Standards Act cases. It defines workers who are dependent on their hiring parties, rather than in business for themselves, as employees. In answering this question, the courts use a multi-factor standard that partially mirrors the common-law test. The criteria include: (1) employers' degree of control over their workers; (2) hired parties' investment in the business and opportunities for profit or loss; (3) the skill level and independent initiative needed to do tasks; (4) the duration or permanence of working relationships between the parties; and (5) whether the work is a crucial part of the employer's business.[52] Close ties between employers and hired parties make the latter employees. But financially independent workers who autonomously handle job-related tasks are independent contractors.

As previously noted, colleges will have no influence on their players' endorsement deals. And athletes make no financial investments in schools' educational missions or their sports "side business." Nor do college athletes have an opportunity to share in the profits or losses from such activities, and this will not change as a result of the NCAA's pending name, image, and likeness compensation rules, which forbids schools from participating in payments to their athletes.[53] Additionally, fulfilling outside partnerships will take independent initiative on college athletes part. Clemson coach Dabo Swinney is not going to babysit his hundred-plus football players to make sure they are keeping sponsors happy when he has other things to worry about. Besides, developments in the way college athletes are able to switch between schools through the so-called "transfer portal" further highlights that universities often have fragile and tenuous relationships with their players.[54] Disgruntled college athletes can leave their schools at any time, even mid-season,[55] and colleges can revoke scholarships when

52. Dynamex Operations v. Super. Ct., 4 Cal. 5th 903, 950 n.20 (2018).

53. *Board of Governors*, *supra* note 5.

54. Greg Johnson, *What the NCAA Transfer Portal Is . . . and What It Isn't*, NCAA (Fall 2019), http://www.ncaa.org/static/champion/what-the-ncaa-transfer-portal-is/ [https://perma.cc/3EK9-AJWN].

55. One of the most prominent recent examples of a mid-season transfer happened during the 2019-2020 school year, when Kobe King left the Wisconsin basketball team. *See Kobe King, Wisconsin's Second-Leading Scorer, Says He's Transferring*, ESPN (Jan. 29, 2020), https://www.espn.com/mens-college-basketball/story/_/id/

players explore transferring.[56] Lastly, apparel marketing, while potentially lucrative, is not integral to schools' educational goals. Thus, college athletes who accept third-party endorsement deals are in business for themselves and can be independent contractors under the economic reality test.

3. The "ABC" Evaluation

The ABC test "presumes a worker hired by an entity is an employee and places the burden on the hirer to establish that the worker is an independent contractor."[57] Workers are employees unless employers satisfy *each* of three designated criteria: (1) the hired party controls their work under applicable contracts *and* in fact; (2) the relevant tasks depart from employers' regular course of business; and (3) the worker participates in independently established commercial activity that mirrors the services rendered.[58] "If the hirer fails to show that the worker satisfies each of [these] three [factors], the worker is treated as an employee, not an independent contractor."[59] Worker advocates consider ABC the most objective test because it is difficult for employers to manipulate, and state legislatures have favored it since the turn of the century.[60]

First, universities' independent contractor pacts should say that, while athletes will comply with all college-wide deals covering team events, they can sign unrestricted personal capacity partnerships with any business. This would give college athletes contractual control over work performed in furtherance of personal endorsements. Also, it is unlikely that schools will affect fulfillment of athletes' partnerships, so college athletes and their outside sponsors would, in fact, retain full discretion over related tasks. LSU football coach Ed Orgeron will not worry about his players' Adidas endorsements since he is far too busy trying to win another national championship. Second, keeping sportswear in the public eye is not related to university education missions. Third, after new NCAA rules take effect, college athletes will

28595145/kobe-king-wisconsin-second-leading-scorer-says-transferring [https://perma.cc/7JH4-HJZC] [hereinafter *Kobe King*].

56. *See* Johnson, *supra* note 54 ("The downside for student-athletes is that their current school can reduce or stop giving them athletics aid at the end of the term in which the request was made to enter the Transfer Portal.").

57. *Dynamex*, 4 Cal. 5th at 950 n.20.

58. *Id*.

59. *Id*.

60. Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J. L.& SOC. CHANGE 53, 66–68 (2015).

independently participate in as many outside partnerships as possible. College athletes perform a service by promoting their schools to national audiences. This function will be mirrored when college athletes market their new sponsors to fans.[61] Therefore, college athlete endorsers can be interpreted as "ABC" independent contractors.

4. An "Entrepreneurial Opportunity"

The latest Restatement of Employment Law retained the above-cited common law criteria. But it "shifted the emphasis away from the unwieldy control inquiry in favor of a more accurate proxy: whether the putative independent contractors have significant entrepreneurial opportunity for gain or loss."[62] The D.C. Circuit used this test to uphold independent contractor pacts with workers who owned their tractors, which could be used for other things, and could hire additional staff.[63] In another case, that court said hired parties who could not use their own vehicles for other jobs, or retain subordinates, were employees, not independent contractors.[64] Thus, the Restatement analysis turns on whether (1) workers can freely accept third-party jobs requiring use of their own possessions, and (2) hire others to assist them with those tasks. If both criteria are satisfied, workers are independent contractors. Otherwise, they are employees.

College athletes will take as many sponsorships as possible after pending name, image, and likeness rules take effect. For example, Chase Young could leverage his on-field performance as an elite defensive end for Ohio State's highly ranked football team into endorsements of Apple, Nike, Whole Foods, and many other businesses. Under the NCAA's new compensation regime, Young would not be allowed to use any Ohio State gear during outside partner activities.[65] Nevertheless, Young could use his other personal possessions for sponsor commitments. Young would also be able to retain outside advisors to vet

61. It is important to recognize that some courts may decide that sports and marketing are completely different services.

62. FedEx Home Delivery v. N.L.R.B., 563 F.3d 492, 497 (D.C. Cir. 2009) (internal citations omitted).

63. *Id*.

64. *Id*. at 498.

65. *Board of Governors*, *supra* note 5 (banning use of conference and school logos in athlete endorsement materials). However, Young would presumably be able to wear shoes and equipment obtained on his own during Ohio State games, as long as they were made by Ohio State's official sponsors. This state of affairs may create an environment where college athletes are incentivized to sign endorsement deals with their school's official sponsors because their apparel would be marketable both as an endorsed product and official gameday items.

potential endorsements.[66] And these third-party partnerships are a notable entrepreneurial opportunity for gain or loss.[67] If Young meets his sponsor obligations, he will earn money and position himself to secure larger endorsements after turning pro. Barring that, Young's partners could cancel sponsorships or sue him, thus inflicting financial losses. Hence, Young, and other similarly situated college athletes can qualify as independent contractors under the latest Restatement test.

B. HOW INDEPENDENT CONTRACTOR STATUS PREEMPTS BREACH OF CONTRACT SUITS

While sponsored college athletes can be independent contractors under the four employee classification standards, how should these agreements work? The answer is simple. Schools should have their athletes honor university endorsements during four specific team activities: practices, travel, media duties, and games. These deals must also allow college athletes to take unrestricted personal capacity partnerships covering all other activities with any company. Under the provided terms, this essay's Joe Burrow, Sabrina Ionescu, and Breanna Stewart examples are official team activities covered by athletic department sponsorships.[68] In contrast, the Trevor Lawrence scenario discussed above[69] is a personal undertaking beyond the scope of Clemson's Nike deal. Similarly, college athletes who wear an endorsee's products during class, or while exploring campus, will be engaged in purely personal activities unencumbered by college partnerships. This clear distinction between college athletes' official and personal capacities will protect schools by guaranteeing university sponsors continued access to bargained-for marketing benefits such as logo exposure during games.

Another question remains: if college athletes' partnerships prompt breach of contract litigation by university sponsors, how will independent contractor status shield colleges? Initially, the hallmark of independent contractor status is lack of employer authority over their hired parties. Schools that sign independent contractor agreements with their college athletes will have no power over the

66. *See* Colo. S.B. 20-123, *supra* note 3.

67. *See* Dan Murphy, *Higher Earning*, ESPN, https://www.espn.com/espn/feature/story/_/id/29388424/how-much-money-college-athletes-make-nil-rights [https://perma.cc/NQ5K-6WDV] (explaining that All-American athletes like Young could earn from $500,000 to $1 million for generating social media content, and noting the earning potential of lower profile athletes).

68. *See supra* Part I.A (discussing Burrow) and Part II (discussing Ionescu and Stewart).

69. *See supra* Part I.A.

solicitation and terms of those players' third-party endorsement deals. Nor would universities be able to influence the fulfillment of such partnerships. And that is exactly the point. Under such circumstances, college sponsors would have a very difficult time proving that any person acting at the school's direction breached the terms of a university-level endorsement pact. Failure to establish this fact is fatal because colleges are not liable for the acts of parties beyond their control.[70] It would be absurd to legally condition schools' compliance with their partnerships on how hired parties spend their free time. For that reason, breach of contract suits grounded in independent contractor college athletes' third-party partnerships will most likely fail.

Comparable tort law principles are also useful here. Respondeat superior doctrine renders companies liable for employees' torts, so long as the relevant behavior is within the scope of their employment.[71] In contrast, many state vicarious liability regimes are reliant on a "general rule that a principal is not liable for the [tortious] acts of an independent contractor acting pursuant to the contract."[72] Contract and tort law theories often overlap.[73] Thus, disgruntled college sponsors will have a hard time persuading courts that the respondeat superior concept within tort law is wholly irrelevant to breach of contract cases provoked by independent contractor college athletes' conflicting endorsement deals. And judges will likely reach the opposite conclusion. Given the parallels between respondeat superior doctrine and the mooted breach of contract suits based on college athletes' conflicting endorsements, courts will probably analogize these legal concepts in holding that unhappy school partners cannot pursue the latter claim.

C. THE INDEPENDENT CONTRACTOR SOLUTION'S POTENTIAL PITFALLS

Independent contractor agreements with college athletes who decide to accept outside sponsorships are a promising avenue by which universities may avoid breach of contract suits that could destroy lucrative sportswear endorsements. However, administrators must be aware of potential pitfalls. First, it is possible, though unlikely, that apparel companies could effectively argue that colleges control

70. *See* United States v. Winstar Corp., 518 U.S. 839 (1996) (analyzing contractual *force majeure* clauses).

71. Clegg v. Falcon Plastics, Inc., 174 Fed. App'x 18, 28 (3d Cir. 2006).

72. Voces v. Energy Resource Tech., LLC, 704 Fed. App'x 345, 349 (5th Cir. 2017) (applying Louisiana law); Kronberg v. Oasis Petroleum North Am. LLC, 831 F.3d 1043, 1048–50 (8th Cir. 2016) (applying North Dakota law).

73. Travelers Indem. Co. v. Dammann & Co., Inc., 594 F.3d 238, 244 (3d Cir. 2010).

athletes to the point where they are employees. Second, if college athletes' third-party partnerships require them to promote products made by school sponsor rivals during team activities, a university endorsee may successfully assert that someone acting on the college's behalf breached the terms of a relevant apparel deal. Third, a school partner could attempt to claim that, since star college athletes' identities are inextricably intertwined with universities, those players' conflicting sponsorships violate athletic department sportswear pacts, thus meriting termination. Fourth, do existing state college athlete compensation laws foreclose universities from using independent contractor agreements to shield their own endorsement contracts?

1. Do Colleges Exert Too Much Control Over Players?

In trying to nullify independent contractor agreements between schools and college athletes with third-party endorsements, apparel companies could narrowly define the "work" done by college athletes in terms of team activities alone. Sportswear firms might then point out that all of these obligations are fulfilled on regimented schedules tightly managed by coaching staffs. Wake-up times, meals, classes, film sessions, practices, meetings, and workouts are carefully choreographed to maximize every second of college athletes' 15-plus hour days.[74]

This counterargument is attractive at first glance. But it is fatally flawed. It ignores the key fact that college athletes who accept outside partnerships would have two distinct "sports-related" jobs: (1) team-related commitments such as practice and games; and (2) sponsor duties. It also neglects the critical points that anything college athletes do in furtherance of their third-party endorsements constitutes "work," and schools will lack any authority over such tasks. Because universities will not be able to control their players' personal marketing activities at all, such athletes are independent contractors.

2. Promotion of School Sponsor Competitors During Games

Congressional inaction, invalid (or even nonexistent) state compensation laws, and poorly drafted independent contractor pacts that omit the terms covered in Part III.B of this paper could let college athletes sign partnerships requiring promotion of school sponsor rivals during team activities. Such deals will put schools at a high risk of

74. Andy Hutchins, *Florida Details Football Players' 15-hour Days with Daily Schedule Graphic*, SB NATION (June 9, 2015), https://www.alligatorarmy.com/2015/6/9/8752711/florida-gators-football-players-daily-schedule-graphic [https://perma.cc/3KM9-6QMW].

losing big-money endorsement pacts. Here, disgruntled university partners would point out that, when college athletes put on uniforms, they advance their school's interest in securing national prominence. By extension, litigious school sponsors could argue that, since someone acting on the university's behalf violated the terms of an institutional endorsement pact, offended partners can sue for breach of contract. And these sponsors will undoubtedly insist that, by letting their athletes endorse competitors' products during official events, colleges are depriving their partners of bargained-for marketing benefits, thus meriting termination. Under Armour alleged deprivation of bargained-for marketing benefits when it moved to terminate its nine-figure sponsorship of UCLA athletics, and other school sponsors may rely on the exact same argument after the NCAA's new name, image, and likeness rules take effect.[75]

3. "Inextricably Intertwined" Personas

University endorsees may also allege that, because college athletes' identities are inextricably intertwined with their schools, athletes' conflicting personal capacity partnerships breach the terms of athletic department-wide sponsorships. If Trevor Lawrence accepts such an Adidas endorsement, Nike could say that, since Clemson football is a key part of his image, that outside partnership flouts the university's Nike deal. This analysis initially looks plausible. But it must clear a difficult hurdle: analogies to professional sports, where conflicting endorsements do not raise such issues. After turning pro, athletes remain linked to their colleges. Even today, Reggie Bush is seen as a USC legend, not a former NFL star.[76] And pro athletes often partner with school and league sponsor rivals. Despite spending his Texas Tech career in Under Armour apparel, and playing in the Nike-sponsored NFL, Patrick Mahomes has a sizable Adidas endorsement deal.[77] While Mahomes' Red Raider past is a big part of his image, Under Armour did not use his Adidas deal to void its sponsorship of Texas Tech sports. Thus, university endorsees that want to use athletes' clashing personal capacity partnerships to invalidate college sponsorships

75. Bolch, *supra* note 45.

76. Ivan Maisel, *Welcome Back, Reggie Bush. You Never Should Have Left*, ESPN (June 10, 2020), https://www.espn.com/college-football/story/_/id/29292508/welcome-back-reggie-bush-never-left [https://perma.cc/6JSW-9TFZ].

77. Tom Childs, *Arrowheadlines: Adidas Couldn't Lose Out on Patrick Mahomes After Turning Down Michael Jordan*, SB NATION (May 12, 2020), https://www.arrowheadpride.com/2020/5/12/21255622/arrowheadlines-adidas-couldnt-lose-out-on-patrick-mahomes-after-turning-down-michael-jordan [https://perma.cc/WWJ7-WJRR].

must differentiate NCAA and professional athletes' outside endorsements.

Some background information on the primary differences between school and professional league sponsorships may help shape the above discussion. Universities normally negotiate apparel partnerships alone,[78] and they are all-inclusive,[79] meaning they cover all sports and college athletes cannot use products made by any other company during team activities. In contrast, professional sports leagues, including the NFL, NBA, NHL and MLB, usually negotiate their sportswear sponsorships as a unified collective.[80] And, other than official apparel such as uniforms, these league-wide deals do not supersede athletes' personal endorsements. That is why prominent MLB players like Buster Posey, Bryce Harper, and Clayton Kershaw take the diamond in Nike uniforms and Under Armour gear.[81] Using independent contractor agreements to facilitate college athletes' personal partnerships would more closely align schools with the approach used by professional leagues without depriving universities of the significant benefits associated with all-encompassing sports team sponsorships. This approach would also guarantee school partners continued access to related marketing benefits like consistent logo exposure.

4. "No Limitation" Clauses in State College Athlete Compensation Laws

The college athlete compensation laws passed by California, Colorado, Florida, Nebraska, and New Jersey all have "no limitation" clauses forbidding schools from imposing any restrictions on players' ability to earn income from their name, image, and likeness.[82] Interpreted broadly, this "no limitation" language can be read as barring universities from implementing the independent contractor solution discussed in this essay. However, all five of these state laws also include "no conflict" provisions forbidding college athletes from

78. Laura Godlewski, *Top Apparel Companies Vying for College Athletic Contracts*, ATHLETIC BUS. (Oct. 2015), https://www.athleticbusiness.com/marketing/top-apparel-companies-vying-for-college-athletic-contracts.html [https://perma.cc/X4HV-YC6T].

79. *See generally* Bank, *supra* note 3.

80. Jenna West, *MLB, Nike Announce 10-Year Uniform and Footwear Deal Starting in 2020*, SPORTS ILLUSTRATED (Jan. 25, 2019), https://www.si.com/mlb/2019/01/25/nike-mlb-deal-uniforms-footwear-fanatics-2020 [https://perma.cc/3F4H-624G].

81. *See* Austin Karp, *Under Armour Extends Contract With Cy Young Winner Clayton Kershaw*, BALTIMORE BUS. J. (Apr. 30, 2015), https://www.bizjournals.com/baltimore/news/2015/04/30/under-armour-extends-contract-with-cy-young-winner.html [https://perma.cc/YZB8-EX7M].

82. *See supra* note 3.

accepting endorsement deals that clash with team contracts.[83] The independent contractor solution is just one way for universities to enforce "no conflict" clauses in state college athlete compensation statutes while also protecting their own partnerships. In other words, the independent contractor solution does not impose any limits on college athlete endorsements beyond those already included in the state laws allowing players to secure third-party partnerships in the first place. Accordingly, the "no limitation" language in state student-athlete compensation laws should not be interpreted as barring schools from implementing independent contractor agreements with their college athletes. A contrary reading would undercut universities' ability to monitor individual athletes' outside sponsorships and, in so doing, protect their own commercial partnerships from destruction via breach of contract litigation.

D. ADDITIONAL STEPS BEYOND INDEPENDENT CONTRACTOR AGREEMENTS

Two other steps may help athletic departments protect their endorsement deals. First, as noted above, college athletes' independent contractor agreements with their schools should bar fulfillment of conflicting partnerships during team activities, but otherwise permit athletes to satisfy their sponsorship obligations. If any college athletes violate these terms, affected universities should consider suing those athletes for breach of contract. This will prove that colleges are making good-faith efforts to honor endorsement deals, while avoiding Contracts Clause and NCAA issues. But such litigation may adversely affect recruiting, and schools should proceed carefully. Second, athletic departments can amend their existing partnerships to say that (1) independent contractor athletes' personal activities, consisting of everything but practice, travel, media duties, and games, cannot breach such contracts, or (2) like in the pros, college partnerships do not supersede player sponsorships, other than for official team apparel. Because contract modifications require consideration,[84] schools might have to give up guaranteed money or other benefits, but the peace of mind may be worthwhile. Yet, university endorsees derive a lot of value from brand consistency throughout sports teams. School

83. *See supra* note 3.

84. Lagen v. United Continental Holdings, Inc., 774 F.3d 1124, 1130 (7th Cir. 2014) (Hamilton, J., dissenting) (citing Operating Engineers Local 139 Health Benefit Fund v. Gustafson Constr. Corp., 258 F.3d 645, 649 (7th Cir. 2001) for the proposition that "under general common law principles, contract modification requires only consideration and acceptance . . . .").

partners would lose this precious marketing benefit if universities adopt "pro-style" sponsorships, and may not be amenable to that solution.

E. PRECAUTIONARY EMPLOYMENT-AT-WILL AGREEMENTS FOR (MOST) COLLEGE ATHLETES

Incoming high school recruits and transfers who already have outside endorsements should immediately sign independent contractor agreements with their universities. But colleges also need to manage other players before they secure third-party partnerships, mainly because some athletes may never sign such deals. The best solution could be a carefully-calibrated employment-at-will regime that protects schools while also looking out for college athletes who have not yet accepted outside endorsements. This arrangement would work as follows: When college athletes are ready to accept an outside sponsorship, they must notify a designated athletic administrator before executing the offered endorsement deal.[85] At that point, colleges would have a fixed window (maybe 48 hours) to provide an independent contractor agreement for approval by the athlete and school officials. After this paperwork is fully executed, the athlete signatory will be free to sign personal capacity partnerships with anyone. Orderly conversion of college athletes from at-will employees to independent contractors will help protect university endorsements without unduly restricting college athlete earning power. Otherwise, turning player-employees into independent contractors could quickly become an *ad hoc* procedural nightmare that might allow a college athlete's new third-party sponsorship to slip through the cracks.

Schools also need to be prepared for scenarios where at-will college athlete employees negotiate an endorsement deal, decide they do not want to sign independent contractor agreements with the university, and are simply too good to be kicked off the team. This could happen if a college athlete's new outside partnership pays more when the athlete wears products made by college sponsor rivals during team activities, and the athlete wants to secure those favorable contractual terms. Although these would be fairly difficult circumstances for schools, they are not insurmountable. To mitigate the damage arising from such cases, universities' at-will employment agreements with their college athletes should include an indemnification clause. This language will stipulate that, if a school sponsor grounds a breach of

85. This parallels the notification clauses in name, image, and likeness laws passed by Colorado, Nebraska, and New Jersey. *See*, *supra* note 3 and accompanying text.

contract suit in a college athlete's third-party partnership, the athlete is liable for all damages and legal fees arising from such matters. This tactical maneuver will help discourage college athlete resistance to independent contractor pacts. After all, no college athlete wants to be on the hook for astronomical legal bills.

Implementation of the above employment-at-will protocol would be pretty straightforward for incoming prospects without sponsors. High schoolers who earn athletic scholarships usually sign binding National Letters of Intent and fax them to their chosen universities.[86] Because these contracts are drafted by the NCAA,[87] individual colleges cannot customize their terms. But the National Letter of Intent program is optional, and some prospects who do not decide on a school within the fixed window of time during which National Letters of Intent can be submitted execute "financial aid paperwork" with their chosen universities instead.[88] Hence, schools could abandon National Letters of Intent and just have all of their scholarship recruits sign customized documents including the above employment-at-will terms. Non-scholarship prospects and walk-ons who earn roster spots[89] would execute substantially similar papers guaranteeing their places on the team. Since scholarships and roster spots would depend on assent to these employment-at-will terms, recruits will not resist signing. And, if needed, schools could sue anyone who breaches these inventive employment-at-will pacts.

Enacting an employment-at-will framework with current college athletes would neatly align with schools' existing processes. When returning college athletes arrive on campus for preseason practice, they attend a team meeting to complete a set of mandatory NCAA forms

86. Matthew Impelli, *Most Surprising Flips on Day 1 of College Football's Early Signing Period*, NEWSWEEK (Dec. 18, 2019), https://www.newsweek.com/most-surprising-flips-day-1-college-footballs-early-signing-period-1478095 [https://perma.cc/E5XX-EGZL] (illustrating events during National Signing Day, which is the first day on which high school athletes can formalize their commitments to their chosen NCAA schools by signing National Letters of Intent).

87. The Collegiate Commissioners Association is also involved. *See About the National Letter of Intent*, NAT'L LETTER OF INTENT, http://www.nationalletter.org/aboutTheNli/index.html [https://perma.cc/9XL6-G7YB].

88. *See, e.g.*, Nick Cole, *Unsigned 2016 5-star WR Signs Financial Aid Paperwork With Pac-12 Program*, SATURDAY DOWN SOUTH (2016), https://www.saturdaydownsouth.com/sec-football/financial-aid-paperwork-five-star/amp/ [https://perma.cc/9BLX-ZA8F].

89. Generally speaking, "non-scholarship prospects" and "walk-ons" are different in the sense that the former, sometimes referred to as "preferred walk-ons" or "recruited walk-ons," are recruited and have guaranteed roster spots when they arrive on campus, while the latter are not recruited and join the team after a successful tryout.

covering drug testing, eligibility, and HIPPA waivers.[90] College athletes also fill out additional documents required by their universities during this administrative session.[91] The latter stack of paperwork normally includes a set of team rules, and, by signing that file, college athletes agree to comply with those guidelines, or risk dismissal.[92] And, as discussed above, the transfer portal allows college athletes to leave their schools for greener pastures at any time.[93] Schools are already in quasi-employment-at-will relationships with their athletes, as either party can terminate their association on their own initiative.[94] Universities can formalize this state of affairs by updating their team rules to include language specifying that all college athletes are at-will employees under the terms listed in the first two paragraphs of this subsection. In exchange for payment in the form of scholarships and benefits such as free gear, health care, preferential class registration, support staff, and tutors, college athlete signatories would agree to comply with all team rules. Critically, converting existing team rules into formal employment-at-will arrangements will protect colleges by allowing them to sue players who ignore rules regarding outside endorsements for breaching their employment agreements with the school.

If they were so inclined, it is possible that employee-status college athletes would argue that they should instead be classified as independent contractors to achieve some unspecified future objective. Here, the employee-status college athletes may reason that they have a similar "working" relationship with their school as their independent-contractor teammates, in the sense that they are under the exact same obligation to attend practice, maintain satisfactory academic performance, and participate in games. The employee-status college athletes would also argue that their association with the university is different from independent contractor athletes only because the latter

90. *See NCAA Division 1 Annual List of Required Forms and Actions*, NCAA, http://www.ncaa.org/governance/ncaa-division-i-annual-list-required-forms-and-actions [https://perma.cc/7EXF-EKY9].

91. *See generally FAQ's for Parents of Varsity Student-Athletes*, MASS. INSTIT. OF TECH., https://www.mitathletics.com/genrel/Parent_FAQ-s [https://perma.cc/Y47A-VJGK]; *Sports Clearance for NCAA Athletes*, CORNELL HEALTH, https://health.cornell.edu/services/sports-medicine/sports-clearance [https://perma.cc/A36L-RK4B].

92. *See LSU's Tyrann Mathieu Kicked Off Team For Violating Unspecified Rules*, CBS NEWS (Aug. 10, 2012), https://www.cbsnews.com/news/lsus-tyrann-mathieu-kicked-off-team-for-violating-unspecified-rules/ [https://perma.cc/MJR3-YZY4].

93. Johnson, *supra* note 54.

94. *Id.*; *see also Kobe King*, *supra* note 55.

happen to partake in outside endorsement activities on their own time.

The foregoing reasoning may initially seem plausible, but it ignores the fact that the degree of employer control over hired parties determines their status, with less control producing independent contractors and more control signaling that one is an employee. College athletes with third-party partnerships would have two "sports-related" jobs: (1) sponsor obligations; and (2) participation in intercollegiate athletics. The college athlete endorser and their partners would retain control over the former, while universities and their coaching staffs would manage the latter. The fact that colleges would (purposefully) retain incomplete control over their sponsored athletes strongly weighs in favor of classifying these players as independent contractors. In contrast, college athletes without outside endorsements would have one "sports-related" job—participation in college sports—entirely managed by the school. The university's plenary and exclusive authority over its non-sponsored college athletes more accurately renders them employees under the law.

CONCLUSION

NCAA sports are a big business, as illustrated by public universities' big-money sponsorships. But colleges face a shifting landscape due to pending NCAA name, image, and likeness rules that will let their athletes accept outside endorsements starting with the 2021–2022 school year. Under these rules, college athletes could accept third-party partnerships with their school sponsors' rivals. Such circumstances are bound to spark related breach of contract litigation. It is unclear if Congress will timely address this new issue, while new state laws that regulate college athlete compensation may violate the federal Constitution's Contracts Clause if they operate retroactively. Thus, universities must seize the initiative by fashioning a legal framework capable of protecting their sizable economic interests in athletic department-wide endorsements while complying with the NCAA's desire to allow its athletes new latitude in profiting from their fame.

Schools can accomplish these twin goals by converting athletes who want to execute outside partnerships into independent contractors and using a carefully calibrated employment-at-will program for all players who have not yet signed third-party sponsorships. This solution will prevent college athletes from accepting any official capacity endorsements that infringe on team partnerships. Further, because an independent contractor college athlete's outside sponsorship activities would reside completely outside of a school's control, any player

subject to such an arrangement could engage in personal capacity sponsorships without causing a derivative breach of university endorsement contracts. Finally, customized employment-at-will programs implemented through team rules will protect colleges' pre-existing partnerships while accommodating those athletes who receive outside sponsorship offers after starring on the field.