

Pass Interference: Potential Tax Implications of NIL Collectives in College Sports

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By Ethan Sanders, Erick Orantes and Staci Campbell

Conference realignments. TV deals continuing to soar. Name, image and likeness. If there is one thing that has recently come to define college sports, it is the constant flux and the ebb and flow of change permeating the landscape, both on and off the field. In the wake of the National Collegiate Athletic Association's (NCAA) adoption of an "Interim Name, Image, and Likeness Policy" (NIL) on June 1, 2021, athletes, athletic departments, coaches and universities have all been working to adapt—some more successfully than others—to the continually shifting state of college sports. One off-field area that the implementation of NIL has already begun to affect is the tax implications of NIL collectives, both for athletes and universities.

In the year since the NCAA implemented NIL, many universities seized the opportunity to attract better athletes to their programs via NIL "collectives." As of July 1, 2022, over 120 collectives have formed or are in the process of forming, and 92% of the 65 Power Five schools have begun the process. Typically organized and designed as charitable organizations, the collectives free up additional funds from boosters and alums to players, providing that players contribute some time to the collective's charitable work. For example, the University of Texas started a nonprofit charity organization called Horns with Heart, guaranteeing scholarships of \$50,000 to each offensive lineman. Horns with Heart is funded by the Clark Field Collective, which has already collected over \$10 million from boosters to support NIL activities for Texas athletes. In Tennessee, Governor Bill Lee signed an amendment to the state's NIL law, removing barriers to coaches or university officials attending NIL events or universities to fundraise for NIL collectives. Alabama has also repealed its NIL law, allowing universities to work directly with NIL collectives, and other states such as Florida, Kentucky and Virginia are attempting to pursue the same route, via amendment or repeal.

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The rapid rise of these collectives prompts the question of how they will be treated under the U.S. tax code. While some NIL collectives have classified themselves as for-profit entities, many others have sought, and obtained, tax-exempt 501(c)(3) status under the Internal Revenue Code, allowing boosters and other contributors to enjoy tax deductions for their donations. The most pervasive model of a tax-exempt NIL collective consists of athletes choosing a charity to which they will contribute services, in exchange for payment (such as the \$50,000 scholarship at the University of Texas) from the NIL collective. Collectives following this model have successfully attained tax-exempt 501(c)(3) status, such as the Hoosiers For Good NIL collective with Indiana University. All donations to Hoosiers For Good by boosters and alums are now tax-deductible.

Although the Internal Revenue Service (IRS) has granted tax-exempt 501(c)(3) status to some NIL collectives, this does not answer the more pressing question of whether those collectives would survive an IRS audit of their charitable status after an examination of their actual activities and operations. The IRS has not issued a position or any guidance on whether the NIL collectives can maintain their tax-exempt status, and the granting of the tax-exempt status is considered by some as merely a procedural action rather than any concrete opinion by the IRS, since such status is granted based on statements describing the NIL's exempt purposes and its proposed activities made in the tax-exempt application. The IRS can later revoke an organization's tax-exempt status if it concludes that the organization does not operate in accordance with the stated exempt purpose in its application or if the IRS determines that the organization's activities serve private interests or provides private benefits to individuals or organizations.

Over a year into the NIL era, there remains a fair amount of regulatory uncertainty regarding NIL activities by both athletes, universities and boosters. Beyond the NCAA and state governments, the IRS may issue further guidance and delve deeper into the makeup and pursuits of NIL collectives, particularly because they are holding themselves out as charitable organizations. Regardless of the swift changes continuing to ripple through college sports, athletes, universities and university donors should take note of what could very well be merely the beginning of a long and winding road to how NIL collectives will operate under tax laws. Accordingly, college athletes, organizations and boosters should carefully prepare and take action to avoid costly litigation under both state specific laws and potential IRS guidance. Collectives should also be aware of the additional regulatory burdens associated with tax-exempt 501(c)(3) status, such as complying with various annual filing requirements with the IRS and allowing public inspection of exemption applications, determination letters and annual returns. They will need to be mindful of the public perception that a collective is just being used to allow large donors to enjoy tax deductions for donations that are then routed to players through the collective.

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