

The Immigration Lens, Episode 6: The Intersection of College Athletics and Immigration

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Dani Mayer

Hello and welcome to our podcast, The Immigration Lens. My name is Dani Mayer. I'm an attorney at Seyfarth on the Global Immigration and Mobility Team. Today, I'll be your host with Mahsa Aliaskari, a partner and co-chair of our practice. Our practice specializes in helping multinational organizations develop and manage comprehensive global mobility programs. To learn about our practice and our team, please visit [Seyfarth.com](https://www.seyfarth.com) or check out our blog. We're joined today by our guest, Alison Silveira, a partner here at Seyfarth, to dive into an evolving and complex issue, how the transformation of college athletics is intersecting with immigration law, particularly for international student athletes. We're thrilled today to speak with Alison about how our two practice areas intersect. Alison, welcome to The Immigration Lens. Could you give us an introduction to your practice here at Seyfarth?

Alison Silveira

Sure. Thanks, Dani, so I am a partner in our Labor Employment group in Boston. I've been with Seyfarth for about nine years, and I came here after practicing for about 10 years at another firm. I spend a good amount of my time in the Wage and Hour space helping employers broadly with issues relating to, I'll say, sort of employee compensation generally on either an individual or class and collective basis. And then I also spend a significant portion of my time working with employers on more general workplace employment issues, staying out of the immigration space. I call Mahsa for that, or you, but focusing instead on claims of discrimination, harassment, retaliation, hiring termination, sort of runs the gamut in the more general employment space.

Mahsa Aliaskari

Great. So Alison, we were excited to talk to you, because there is so much going on in kind of the specific landscape as it relates to student athletes. Could you kind of share with us what you're seeing in the shifting legal framework for the students and what's going on campuses for the athletes?

Alison Silveira

Sure, but I could talk for a long time about that, so I'll give you, I'll start. I have to start for one second with a history lesson, which is only that sort of it all stems from the concept of amateurism. So the concept of amateurism appeared in the NCAA, very first constitution in 1906 it predated any employment law, any anything, any wage laws, anywhere in the United States, any labor laws. So the idea was created an understanding from the outset of organized athletics that college athletes would not be paid for what they were doing, and so it went. It wasn't even until 1948 so 42 years later, that colleges and universities could even cover the cost of tuition for student athletes. So fast forward. I won't go all the way through the history, but focusing kind of on the last 10 years, there's been a lot of

challenges, both on the labor side with the National Labor Relations Act, and then on the wage side with the Fair Labor Standards Act and then some related state law challenges to whether or not student athletes should actually be classified as employees, whether of the NCAA, the conferences that the NCAA is organized into, that the universities compete with him, or the universities themselves and so all but all of those cases consistently found that student athletes were not employees under either law, either relying on the concept of amateurism, and sort of this kind of revered tradition of amateurism. There was some Supreme Court case law that talked about the revered tradition of amateurism, relying on that first NCAA constitution, or just finding that what university students competing in athletics do is really just outside the scope of what these laws were ever intended to address. But that landscape in 2021 shifted dramatically with a United States Supreme Court case called *Alston*. The case was an antitrust case. It challenged some of the NCAA rules regarding what forms of compensation and benefits schools could offer to college athletes, specifically around whether or not colleges could offer athletes Postgraduate Scholarships, expenses relating to studying abroad and post eligibility, internships, the what they were talking about is not relevant to today, as much as that. In that opinion, the Supreme Court basically eviscerated the concept of amateurism. And what they did is between the majority opinion and there's a scathing concurring opinion that basically says amateurism doesn't exist. It's a thing the NCAA created. It's not something that can get you around the laws that exist and govern every single other industry across the United States. And so there's no case that has gone to the Supreme Court again since 2021 that challenges the employment status of college athletes under either the NLRA or the FLSA. But the decision, what it did is it prompted the NCAA to start to change some of their rules. And so the right after the *Alston* decision came down, the NCAA lifted its restrictions around whether athletes can receive compensation for use of their name, image and likeness, which you'll hear on the media, NIL and NIL deals everything about NIL and so under current NCAA rules, they went into effect in probably November of 2021 while universities and other institutions still cannot compensate athletes, other than through scholarships and other education related expenses, athletes are able to enter deals with outside, third parties who want to use their name, image and likeness, sort of like endorsement deals that you see in other professional sports industries. It's still not permissible to pay an athlete to play a sport. So this idea of pay to play, they can't be paid to play. You can't say, I'm going to pay you to go be the offensive lineman for some football team, or because you get x result on the field, but paying you to come endorse my brand is permissible now, but it's this entirely new industry, and I would say it's still kind of evolving and changing every day. And then, relatedly, there's a settlement in a case called *House versus NCAA*, that is likely to come down in the next couple days. We're likely to find out whether it gets approval from the court in the Northern District of California. If that settlement is approved, colleges and universities are also going to be able to start entering direct revenue sharing arrangements with college athletes. So NIL currently is limited to outside third parties who want to enter brand endorsement deals. If the house settlement gets approved, part of the settlement is that universities will be able to enter into--they're not called NIL deals. They're called revenue sharing agreements with their own athletes as well. There's a cap, so it's \$20 million a year for per athletic department or university that they can enter into with their athletes across the athletic department, but it would be up to a university. It leaves it up to university decide how to divide that money amongst the athletes who compete for that university, and scholarships would be included in that cap. It would be that first time that universities can start directly sharing that revenue with the college athletes. I think it's being conceptualized differently. What these deals would look like. Rather, they're NIL, you know, are we paying to essentially license for a licensing agreement, non

exclusive for using your name, image and likeness, or is it actually revenue sharing, where it's some sort of percentage of revenue that the that the university earns up to a cap. There's no Terms of the deal that require agreements between the universities and the students to be structured in any particular way. But that's sort of where we are right now with these two separate forms of compensation. And my long winded answer to your question.

Mahsa Aliaskari

Really fascinating. I mean, as you're talking, I'm just kind of jotting down notes because thinking of all these questions that are coming to me, but it really does lead us to the immigration piece right for international students who are here in F1 status, and how these evolving financial arrangements may pose a risk to their to their status, or how, you know, how is it that they're going to be negatively impacted because they won't be able to be involved in some of these financial structures? And that's really the key question. But before I get that, just to kind of really set the stage, what are the numbers we're looking at? Is it a significant component? And that presumably depends on the sport, you know, hockey versus American football.

Alison Silveira

Yeah. So I tried to, in preparing for today, I tried to figure out, sort of what the numbers are of international students competing for the NCAA, the last of NCAA, reliable source that I was able to find, estimated 25,000 international students competing across all of the division one, division two and Division three. I should say the house settlement, by the way, is limited to division one universities, so division two and Division Three are not part of the settlement. In particular, it's really focused on Division one. So with those numbers this sort of assuming it's still relatively steady at the 25,000 it's about 13% of division one athletes are international student athletes, and you're right. So sports like hockey and tennis are much higher percentages than other sports, where the percentages of international competitors is much lower. And the issue that you were just raising just to go back for a second, so NIL has been around now for a couple of years. This is a whole new world, and I'm not an expert in this field. You guys are more experts than I am. But my understanding is that so far, international student athletes have not been able to participate in a meaningful way in even the NIL market, so putting aside the revenue sharing that may come down if the house element is approved from so getting being able to participate with their own university because of their visa status. My understanding is that they haven't been able to participate. There's been some exceptions, but mostly across the board, my understanding is that the international student athletes, their visas won't allow them to work. You guys find no more than I do or money while they're here, and it's been impediment. To them being able to enter into nil deals, because if they can't earn money, they also can't enter into endorsement deals with US brands, or that would require them to the way that the NIL deals work is often that they because it's not pay to play. It's not about what they do on the field. The NIL deals, they'll either be going to marketing campaigns of some sort for the brand. They'll be going to children's hospitals and making appearances for the brand. They might be signing autographs. There's all kinds of things that the athletes are doing in exchange for the money that they're getting. And so that can't happen. My understanding is so that they can't earn money while they're in the US. And like I said, I think there are, I've heard of some exceptions where they might do that work in a home country, or with a brand that's based in the athletes home country, so that the work is being performed outside the US.

But that's the exception, not the rule. And so for a large part of the international student athletes, this has been a market that, to date, they haven't been able to participate in.

Mahsa Aliaskari

Right, And so, you know, just the backdrop to that question of, why can't they is really that F1 visa category and the limitations of work authorization for the F1 and there are some right? So we have Curricular Practical Training for F1 students, which basically allows for employment that's tied to credits, tied to them enrolling in particular coursework within their degree program. And in those instances, it's they have to get credit, but they can also be paid. So we outside of this area, we do have folks who are in F1 undergrad and grad programs that get Curricular Practical Training tied to their courses and their graduates and undergraduate studies, and they will work in internship programs or other sorts of things while they're gaining experience, getting paid continuing their studies. So that's curricular practical training. So that's one interesting area where maybe there's an avenue, or maybe there's an avenue to champion for changes and updates to the policies that would allow and expand their ability student athletes, in particular, right to use this CPT component of the F1 work program to be able to engage in the NIL deals, or future looking potentially in these revenue sharing deals. Beyond that, there's obviously Optional Practical Training, which is the work authorization students receive after completing their studies, and it's open employment, which would give them that opportunity. Some of that can be used while they're still in school. So there's, you know, all these but it but it's just really cumbersome for you to be able to kind of figure out how to fit these changes in this space into current visa law. So a lot of it may really be about terminating what's the right time to go and really champion for changes to how these work authorization rules are applied to student athletes in particular, because I have a question you know about, how does it impact the competitive nature of being able to get the top athletes into the schools here in the US, and are we losing that piece of or that flow of Athletes into the US. Any thoughts on that?

Alison Silveira

I think some sports more than others, for sure, the home student athlete composition is changing, I would say, given the NIL landscape. I mean, I was just at a conference a few last week, actually talking about how, you know, in the world of women's soccer, the professional women's soccer is getting younger and younger. You know the idea of, do athletes go to college at all right? Like, Is college worth it? Is that? Do they go straight to a professional league? And NIL maybe, is keeping athletes in college because there's this opportunity to earn money in college. But the whole landscape of sport is changing. There's lots of concerns that this. I think it's hopefully not real. But the idea of, like, our what's the future of the Olympic sports, right? The non revenue generating sports, what's the future of that, if employment status becomes a thing, and colleges and universities had to, or the NCAA or the conferences or whoever, had to start paying hourly wages to student athletes, where, Where does that leave The future of the Olympic sports. I think that's hopefully not something that we have to be concerned about in terms of where this market, where this is all going, but it is something that people are talking about. One thing, can I ask you a question Mahsa? I know, of course, I know. I don't want to be the one asking any questions here. No, of course. So I've heard of some athletic departments that offer course credit for participation in college athletics. I've also heard of athletic departments that offer working with the school, obviously, but offering courses on NIL and courses, you know, these are kids, right? Like they are being these are kids, you know, marketing and brand, self branding, and get,

you know, getting themselves out there courses that, unless you were a business major, you didn't take in college, right? And they're becoming forefront, especially if you're at a large division one institution where NIL is everywhere. Were those the kinds of courses that the other thing, I guess, before I have a question. The other piece of this is like, these are kids, right? Like, right? So, I mean, I went to college on an athletic scholarship, and when I was a freshman, I couldn't sign my own scholarship related paperwork because I wasn't 18 yet, I had to send it home for my mom and dad to sign, right? I feel like these like, so are those the kinds of courses or support, or are there things that universities could be doing that might put them in a better place for the CPT credit that you were just talking about, or to be able to take advantage of that aspect of the law to help out international students?

Mahsa Aliaskari

Yeah, so that's actually what I was going to kind of dive into. So you hit it right on the nose, because it is really about my understanding, from what you had shared before when we were preparing, is that there are courses that are being offered at schools right to help these college athletes learn how to manage this financial and business component of being a college athlete that wasn't there before. So yes, Curricular Practical Training is tied to coursework. So if you have that coursework, why couldn't it include some component? And this will require a lot of people to think through, what could this look like, but I think that is an avenue to definitely go down and see. The other thing that I find interesting, when you mentioned for the revenue sharing, could it potentially be an exclusive licensing agreement for NIL, and then I thought, Well, how about the work authorization you can get on campus? Because there's on campus work authorization students get to like, is there a way to set any portion of this up that that could potentially be so it would be a combination of curricular practical training on campus, work authorization and optional practical training the OPT could you kind of piece all of those together in such a way to be able to support These F1 international athletes? So, I just see, I don't see a straight, easy way to do this, but I do see a lot of different components of existing F1 programs and regulations for work authorization that could potentially fit in different ways. And, you know, increasing scholarship funding, right? Could be, could be one of those easier ways that you don't have to deal with the F1 work authorization options that are available. But definitely a lot there for us to, I think, for schools to dig into and see what they can do. And I mean, these are challenging environments. It's a challenging environment outside of what we're talking about in the in the context of immigration in schools and schools in general, universities in general. But I don't see why it wouldn't be something that schools can at least start kind of thinking through, because it'll take some time to implement that, you know, I'll give an example in the F1 context. You know, there's this concept of having optional, practical training for the 12 months after you graduate. But if you're in a STEM program, science, technology, engineering and mathematics, you can get an additional 24 months. You get a total of 36 months of work authorization after you graduate. If you're a stem grad, right? And a lot of folks who were in MBA programs at a lot of top universities, they weren't deemed STEM programs, but if you looked underneath them, you could see that they actually were tied to one of the STEM degrees, right? So they updated how they kind of classified their MBA program so that they qualified for STEM and that took some time for us to get to that point where, you know, in the last two years, we see a lot of these MBA grads with these updates, and their coding updated so that their stem so they get the additional 24 months of work authorization. So I see similarly here, it's something that can start now that you know, and for schools to think through and walk through potential avenues of leveraging existing work

authorization components of the F1 to see how they can be applied to NIL, or this revenue sharing in the future.

Alison Silveira

For work authorization, would they have to be considered employees of the universities?

Mahsa Aliaskari

Yeah, that's a good question, not for the curricular practical training, right? The CPT, not necessarily. But those are all those, you know, those details to get to where you can be. But I think I do see a lot of potential here. I'm the easiest one that really jumps out at me is, is the scholarship component of it, and maybe that's the way that you know, until the work authorization component of it can be flushed out and something can be set up, that that might be one of the easier ways to do it. Yeah, all right. Well, this has definitely been an interesting conversation, so we appreciate you taking the time with us. Any kind of final thoughts on your end that you think would be helpful or interesting to share.

Alison Silveira

I don't think so. I mean, this is interesting for me. It's an avenue that there's lots to figure out. And this is one that I think there you're right, there's so many potential things, so thinking through these issues is really helpful.

Mahsa Aliaskari

Yeah, very good. Well, Alison, thanks so much for joining us today. We're happy you were able to take the time. I certainly learned a lot, and it gets me excited when I can think of different ways, creative ways, to help manage some of these things when it intersects with immigration. So we really appreciate your time today.

Alison Silveira

Thanks for having me and letting me talk about things that keep me up at night.

Dani Mayer

Thank you so much for joining us. To our listeners, thanks for tuning in to The Immigration Lens. We hope that you enjoyed today's episode on foreign student athletes. If you enjoyed this episode, please subscribe and leave us a review, and if you're interested in tuning into the conversation. Follow our blog at bigimmigrationlawblog.com or check out our practice page at Seyfarth.com Thank you.