

# NIL: Residency Matters

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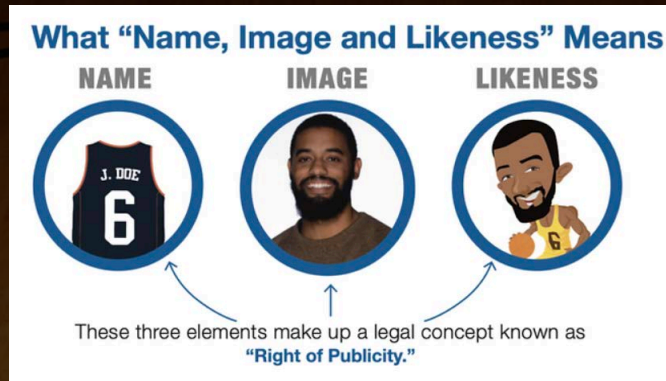
- 1) Background on recent legal changes that now allow college athletes to earn income for their Name, Image or Likeness (NIL)
- 2) Brief description of pending legal issue for student athletes who receive NIL income, which may be covered in future publications.
- 3) State income tax issues surrounding those who receive NIL income – with a focus on states' presumptive state residency rules.
- 4) Public policy recommendation regarding which state should have jurisdiction over NIL income.

## Highlights of Paper



# What does NIL stand for?

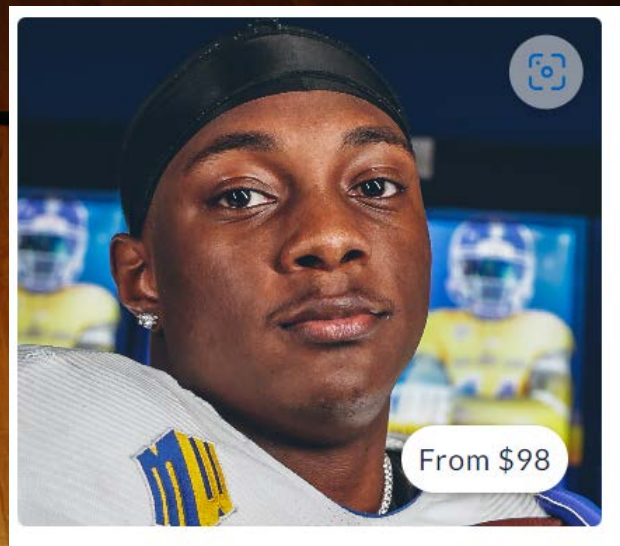
It's the legal grounds that allow or prevent the use of that individual's NIL to promote a product or service



3 components that make up every person's "right of publicity."

# NCAA vs. Alston

- In 2021, in *NCAA vs. Alston*, U.S. Supreme Court upholds the 9th Circuit's holding that the NCAA cannot prohibit college athletes from receiving income for their name, image or likeness.
- Prior to *Alston*, per NCAA guidelines, if a student athlete was photographed wearing a particular athletic brand and that brand used the photo to promote their products, the student athlete would not be paid.
- *Post-Alston*, in order for the brand to use the photo, it must have the student athlete's consent, and must pay the student athlete for the use of their NIL or be in violation of the right of publicity.





## NIL Rules Vary Widely

- NCAA allows individual schools and conferences to develop and adopt their own NIL policies, activities, and restrictions that vary from state to state and school to school
- Virginia House Bill 1505, passed on April 17, 2024, allows Virginia colleges and universities to pay student athletes directly for NIL activities, however under the law, student athletes are not characterized as employees.



## Johnson v. NCAA and Dartmouth College

- Johnson Case: allege that student athletes should be recognized as revenue generating workers
  - Because student-athletes engaged in interscholastic athletic activity for the colleges and universities are **employees** who should be paid for the time they spend involved in athletic activities
- Dartmouth College: National Labor Relations Board held that men's varsity basketball players were employees under the Fair Labor Standards Act





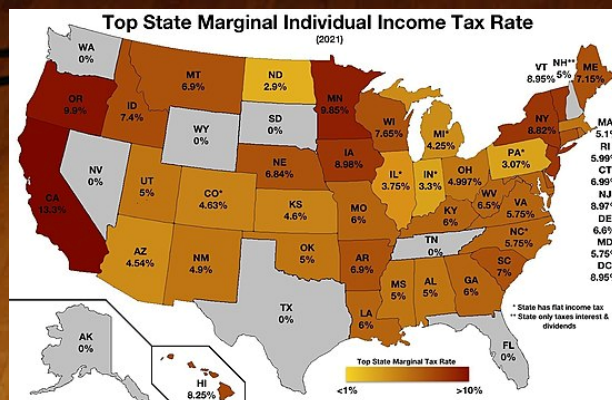
# House v. NCAA Settlement

- On May 24, 2024, the NCAA and the Power Conferences settled three pending antitrust cases (House, Carter and Hubbard, commonly referred as “House Settlement”) resulting in \$2.8 billion in damages to be paid to former student athletes, and payment of 22% of the average of each Power 5 school’s revenues to current student athletes.
- The framework and payment process of the settlement proceeds are yet to be determined, but payments will have federal and state tax implications.



# State Income Tax Issues

- Every state (with an income tax) has their own unique set of rules to determine how and when an individual’s income is subject to tax in their particular state.

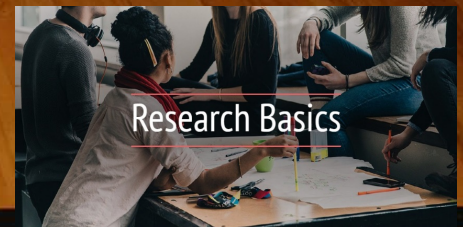


- Some of the major factors that come into play in the determination of the amount an extent of one’s income that is subject to tax in a particular state include: (1) state tax residency of the taxpayer; (2) apportionment and allocation rules for trade/business income; (3) potential state tax credits to help fully or partially mitigate double-taxation of the same income in multiple states; and (4) state reciprocity agreements.



# Prior Tax Publications on Tax Issues Surrounding NIL Income

- Most publications focus on Federal income tax matters (example – M. and F. Messina)
- State income tax works have been very limited – given the very complex set of rules that are unique in each state.
- Some of the state income tax publications have focused only on the very high-level items (such as standard deductions, personal exemptions and income tax rates at the state level) – Ringbauer and Chuah



## Primary Focal Point in Our Paper – State tax Residency Rules

- In general, for state income tax purposes, residency primarily relates to the physical act of residing in a particular state (i.e., a place of abode), whereas domicile denotes a complex set of facts and circumstances that generally focus on the intent of an individual as it relates to their permanent home, which may or may not be the state in which they live throughout or even part of a year.



## Various Domicile Factors



## State Tax Residency Rules

- States have state tax residency rules, with presumptions which are typically based on the number of days physically living in the state during the year.
- States generally tax ALL of the income of their residents – even if earned outside of the state.
- Sometimes the residency of a college student is difficult to determine.
- We researched, on a state-by-state basis, the detailed state income tax presumptive residency rules (pages 10-26 of the paper).
- A majority of the states have a more than 183 day presumptive resident rule, but many give traditional domicile guidelines the highest level of authority.



## A Few State Have Special Guidelines Specifically on College Students:

- (California) “Students who are residents of California leaving this state to attend an out-of-state school do not automatically become non-residents, nor do students who are non-residents of California coming to this state to attend a California school automatically become residents. In these situations, individuals must determine their residency status based on their facts and circumstances[.]”
- [California FTB Publication No. 1031 - 2023 Guidelines for Determining Resident Status]



## Special College Student Rules (Cont.)

- **Hawaii:** “An individual's status as a resident or nonresident shall not change solely because of the individual's presence or absence in compliance with military or naval orders of the United States, while engaged in aviation or navigation, or while a student at any institution of learning.”
- Example 9: Mr. and Mrs. K are residents of Michigan. Their daughter, L, also is a Michigan resident L came to Hawaii to attend college and took action to become a permanent resident of Hawaii. L closed her bank account in Michigan and opened a bank account in Hawaii. L also became a member of a local church in Hawaii. Although L works part-time, more than half her support comes from her parents. Her parents are able to claim her as a dependent.



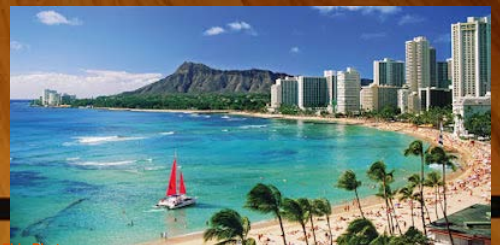
## Special College Student Rules (Cont.)

- Conclusion: L is deemed to be a non-resident of Hawaii. Although L took action to become a permanent resident of Hawaii, her principal reason for being in Hawaii is to attend college. This example falls under the provision of the statute, which provides that a person shall not be deemed to have gained a residence in Hawaii simply because of the presence here while attending school.
- A non-resident individual who is in Hawaii while attending school will not be deemed a resident of Hawaii unless the individual establishes a domicile in Hawaii.
- L cannot establish a new domicile in Hawaii since L is still eligible to be claimed as a dependent on L's parents' federal income tax return.”
- Source: Hawaii Tax Information Release No. 97-1 (3/3/97)



## Special College Student Rules (Cont.)

- While issued a number of years ago, the state’s summary conclusion in 1997 could potentially run as a rebuttal to the state’s 200-day physical presence residency threshold presumption rule (through a domicile-based status of the college student).





# Kansas



- While Kansas has a general more than six months presumptive residency rule, it has regulations on domicile that include a provision for an individual's status as an (in-state or out-of-state) college student, including whether in-state or out-of-state tuition was charged by the university.

[Kan. Admin. Regs. Sections 92-12-4a(b)(7)(D) and 92-12-4a(b)(7)(P)]

# Massachusetts

- The Massachusetts Department of Revenue also provides guidance for college students as it relates to their place of abode.
- The state has a general more than 183 day presumptive residency rule.
- Technical Information Release No. 95-7 (01/10/1996) contains the following two examples:
  -





## Massachusetts – Example 1

- Donna is an out-of-state student attending university in Massachusetts.
- She lives in a room in one of the dormitories on the university campus. She shares her room with another student: Donna also shares bathing facilities with other students who live on the same floor.
- Donna lives at the dormitory for the entire school year, which runs from late August 1994 through May 1995.
- When the school year ends, Donna moves out of the dormitory and resides out-of-state.
- Donna returned to the university in August 1995 to begin her junior year and again resided in a dormitory room on campus.
- Although Donna is present in Massachusetts for more than 183 days in 1995, her dormitory room is not considered a permanent place of abode.
- Therefore, Donna is not considered a resident of Massachusetts for 1995.

## Massachusetts – Example 2

- Frank is a student at a university in Massachusetts.
- He lives in an off-campus apartment near the university with three other individuals.
- All four roommates share living expenses, including expenses for utilities, phones, and cable television service.
- Frank lives in the apartment for more than 183 days in 1995.
- Since Frank is present in Massachusetts for more than 183 days and is maintaining a permanent place of abode, Frank is considered a resident of Massachusetts for 1995, **even if his domicile is elsewhere** and he intends to leave Massachusetts upon his future graduation.



# Maine

- While Maine has a more than 183 day presumptive residency rule, they do have special guidelines for college students.
- Under Code Me. R. 807(.01)(C), while a “permanent place of abode” includes a house, apartment, residential care facility, dwelling place, or other residence that an individual maintains as a household for the entire tax year, it does not include a dormitory room used by a student during the school year.



## Maine (Cont.)



- Furthermore, under Code Me. R. 807(.09), college students generally remain residents of the state in which they were domiciled prior to attending college, even if they attend college full-time in another state.
- Therefore, as pointed out in the regulation “a Maine resident who attends school in another state remains a Maine resident and must pay Maine income tax on all taxable income from all sources until that individual establishes a domicile in a different state.”



## Maine (Cont.)



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## Maine (Cont.) Maine Revenue Services' Guidance

- Per Determining Residency Status (Rev. 3/1/23):

### Resident Student.

John attends a college outside Maine and lives in a dormitory room on campus.

He graduated from high school in Maine and when he returns to Maine, he stays with his parents.

Even though he spends most of his time in another state, he continues to be a Maine resident because he has not established a new domicile in another state.



## Maine (Cont.) Maine Revenue Services' Guidance

- Also Per Determining Residency Status (Rev. 3/1/23):
- Non-resident Student.
- Donna is domiciled in New Jersey and attends college in Maine.
- She lives in a dormitory room on campus during the school year (240+ days), which runs from late August to May.
- When the school year ends, she moves out of the dormitory and returns to live with her parents in New Jersey.
- The following August, Donna returns to college for another year and again resides in a dormitory room on campus.
- Donna's domicile remains the same as her parents.
- Although she spends most of her time in Maine, she has not changed her previous domicile.
- In addition, she is not a statutory resident, even though she was present in Maine for more than 183 days, because her dormitory room is not considered a permanent place of abode.

## Minnesota

- Minnesota Department of Revenue's Individual Income Tax Fact Sheet No. 1 (Rev. 12/27/2022) provides the following guidance:

"Students remain residents of the state in which they have established permanent residency (even if they attend school full-time in another state) unless they take steps to establish a new residency. If you are a resident of another state attending school in Minnesota, you may be considered a Minnesota resident under the 183-day rule."





## New York

- While the State of New York has a more than 183 days general residency rule, it does have specific guidance for college students.

“A dwelling place maintained by a full-time student enrolled at an institution of higher education ... in an undergraduate degree program leading to a baccalaureate degree, and occupied by the student while attending the institution is not a permanent place of abode with respect to that student. A full-time student is an individual who is carrying a minimum courseload in such program of 12 credit hours per semester for at least 2 semesters, or the equivalent, during the individual's taxable year.”

[NYCRR Section 105.20(e)(1)]



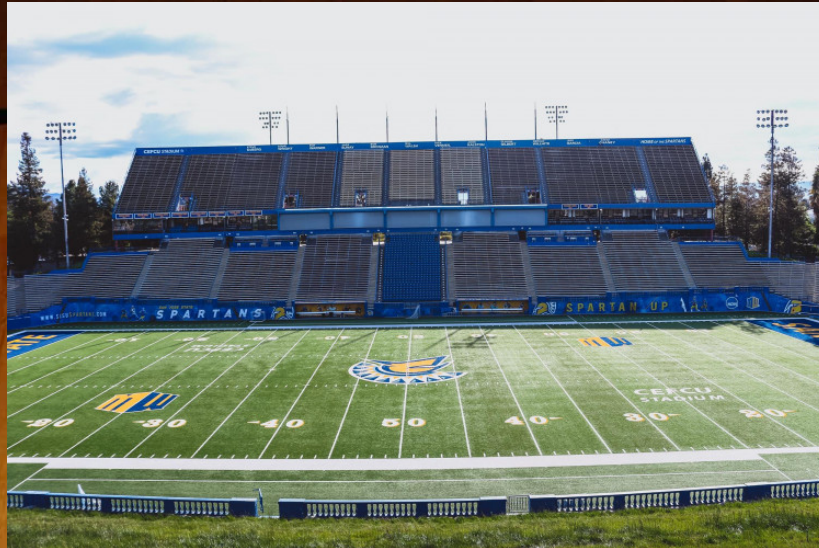
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## The Need for Consistency on Residency – A Prior Example of States Working Together to Simply and Have More Uniformity





## Even Better / More Precise Proposals for Rules on State Tax Jurisdiction on NIL Income



### #1 – State Jurisdiction Based Solely on State of College When NIL-Income Services are Provided

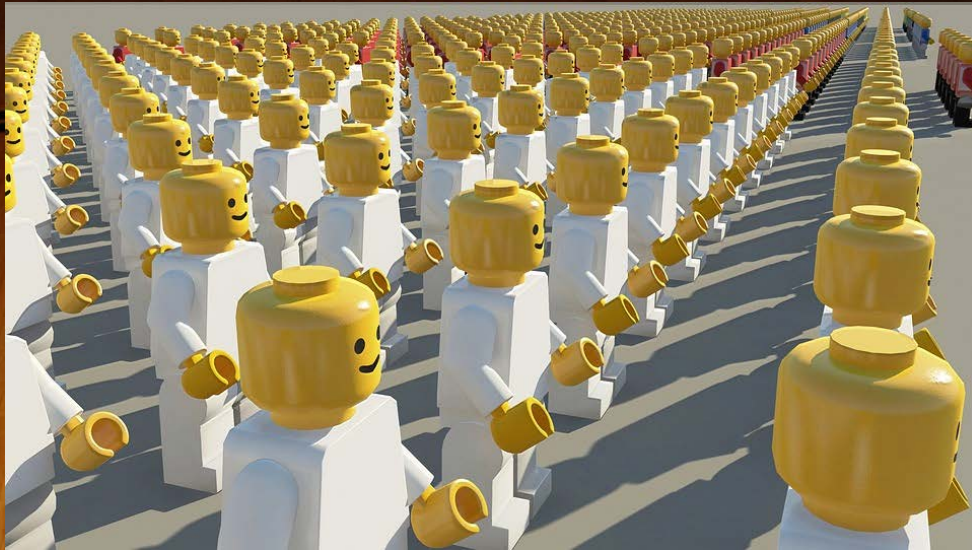
**Eliminates issues surrounding state residency and domicile.**

**Students know what state they need to report their NIL income.**

**Bypasses more complex apportionment rules if students have activity in more than one state (such as shooting television commercials in more than one state).**



## #2 – More Uniform Residency Rules



## #3 – Clarification that Professional Athlete State Tax Rules Do Not Apply to College Athletes





Thank You



## Upcoming SJSU MST Tax Conferences and Webinars

- **40<sup>th</sup> Annual TEI-SJSU High Tech Tax Institute**
  - November 4 – 5, 2024
  - **Keynote Presenters:**
    - IRS Commissioner Danny Werfel
    - Former Assistant Secretary of Tax Policy and Former Acting IRS Comm'r - David Kautter
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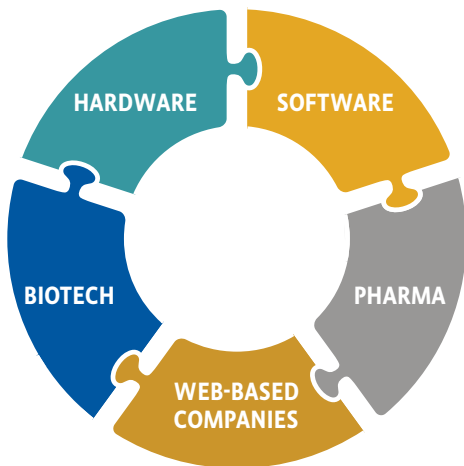


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