

MAY 5, 2026 | PUBLICATION

## Client Alert: The Transfer Portal & Athletes Breaching Multi-Year Agreements: A Risk Mitigation Guide for Athletics Departments and Legal Counsel

With the rapid evolution of college athletics, institutions are entering into increasingly complex agreements with student-athletes, including name, image, and likeness (NIL) and revenue-share agreements, all within a constantly changing environment.

The issue of athletes breaching multi-year NIL and revenue-sharing contracts—while arguing that no binding agreement was formed or attempting to avoid complying with buyout provisions by claiming they function as illegal penalty provisions – has been prominent in recent news. These are also issues we encounter regularly in practice. For athletics departments and their legal counsel, ensuring that these agreements are fully operative, and that their early termination provisions are as enforceable as possible, requires careful planning and strategic drafting.

### Securing the Enforceability of the Agreement: Distinguishing Formation from Performance

Athletics agreements often require student-athletes to complete various administrative steps, such as signing financial aid agreements, meeting NCAA or conference eligibility requirements, and submitting tax (W-9) or ACH direct deposit forms. Counsel must carefully distinguish between requirements that delay contract *formation* and those that merely delay *performance* until a future date, typically the upcoming season or semester.

The existence of a **condition precedent to formation** means that no contract exists until that condition or conditions are met. Conversely, a **condition precedent to performance** means the contract is binding upon execution, but certain obligations—such as the university’s obligation to issue revenue-sharing payments—are

### INDUSTRY SECTOR

Hospitality, Leisure & Sports

### SERVICE LINE

Labor & Employment  
Litigation & Disputes

### RELATED PROFESSIONALS

Bart H. Lambergman  
Bennett H. Speyer  
Robert A. Boland  
Frank Hawkins

### MEDIA CONTACT

Wendy M. Byrne  
wbyrne@shumaker.com

suspended until specified requirements are completed.

To mitigate risk and ensure enforceability, contracts should explicitly state that the completion of administrative paperwork is not required for the agreement to be valid and binding.

For example, language such as, “*ACH direct deposit and tax documentation will not need to be completed for this Agreement to be a valid Agreement,*” ensures the contract is legally binding upon signature, even if the athlete delays submitting required forms. While it may seem unreasonable that athletes or their representatives attempt to rely on their own delays to argue that no binding agreement exists, this tactic is increasingly common.

### **Navigating the Transfer Portal: “Buyouts” vs. Liquidated Damages**

When addressing potential breaches, early terminations, or an athlete’s decision to enter the transfer portal, athletics departments frequently utilize fixed payment provisions — often referred to as “buyouts.” Under general contract law, these provisions are evaluated as liquidated damages clauses.

Courts will generally enforce such early termination fees if they meet specific criteria. A liquidated damages clause is enforceable if (1) the amount is reasonable in light of the anticipated or actual loss caused by the breach, **and** (2) the damages are difficult to quantify at the time of contracting.

In the athletics context, counsel can persuasively argue that the financial harm to the institution—such as the future value of the athlete’s NIL rights, lost opportunities, and sunk administrative costs—is inherently uncertain and difficult to calculate. If the stipulated amount represents a reasonable estimate of those damages, it is more likely to be upheld. Including explicit language to this effect in the agreement is advisable.

### **The Penalty Trap: Unequal Bargaining Power and Staff Conduct**

These provisions carry significant risk if they appear arbitrary or punitive. A clause imposing an unreasonably large or arbitrary fee may be deemed unenforceable as a penalty on public policy grounds. For example, a blanket requirement that an athlete repay 50 percent of unpaid amounts, without an individualized assessment of anticipated harm, may be struck down—particularly where there is a disparity in bargaining power between the institution and the student-athlete.

Intent and staff conduct are also critical. A provision will not be enforced if it operates as a punitive deterrent designed to restrict athlete mobility, punish a transfer, or coerce performance. If athletics staff—such as a head coach—invoke a buyout clause to threaten an athlete’s academic progress, graduation timeline, or team standing in retaliation for exploring the transfer portal, a court is likely to view the clause as an unlawful penalty and invalidate it.

### **Drafting & Compliance Best Practices for Athletics Counsel**

To mitigate risk and improve enforceability, athletics counsel should adhere to the following best practices:

**Clear Labeling:** Avoid terms such as “buyout” or “penalty.” Instead, label the provision “Liquidated Damages.”

**Express Language:** Clearly state that the provision is compensatory in nature and not intended to restrict athlete mobility.

**Document Intent:** Include language confirming that the amount represents a reasonable estimate of anticipated damages, acknowledging the difficulty of calculating the actual loss at the time of contracting.

**Staff Training and Separation:** Ensure that coaches and athletics personnel understand that contractual provisions cannot be used as leverage or threats. Maintain a clear separation between contractual enforcement and coaching conduct.

**The Waiver Issue:** A final issue frequently encountered by institutions is how to handle situations where an athlete breaches an agreement, but the institution is ambivalent about enforcing it. Allowing the athlete to depart without enforcing the agreement may seem efficient and cost-effective. Doing so, however, may expose the institution to arguments that it has established a precedent of waiving similar provisions in other agreements.

Agents and their counsel may attempt to rely on such past conduct to challenge enforcement in future cases. Accordingly, rather than simply allowing a departure without documentation, institutions should issue a written communication reaffirming their rights. For example:

*“Upon investigation and review, the University declines to pursue further enforcement of its rights under the agreement. This determination, reached after consideration of the costs and expenses involved, does not constitute a waiver of any similar rights now or in the future.”*

This approach preserves institutional flexibility while mitigating the risk of broader waiver arguments.

If you have questions or would like more information, please contact Bart Lambergman, Bennett Speyer, Bob Boland, or Frank Hawkins.