

Action Plan to Mitigate Concerns and Legal Risks of Playing Fall 2020 Football

Premise #1:

The NCAA made a mistake in banning “liability waivers” in response to Senators Booker’s and Senator Blumenthal’s demands. Though this decision was meant to protect student-athletes’ rights, the NCAA’s paternalistic reaction to the Senators’ demands had the effect of depriving student-athletes of making an informed choice¹ that would allow them to pursue their dreams.

Premise #2:

Contractual arrangements allowing parties to make fully informed decisions about shifting or modifying legal rights arising from an event, providing services, or a particular transaction have long been a part of American commerce.

Premise #3:

In a number of states, legislatures have enacted certain limitations of such arrangements.² Upon close examination of those statutory limitations, however, they leave room for parties to agree to risk-shifting arrangements for negligence, reliance on statements made by the other party outside the contract, limitations on damages, assumption of risk, and mandatory arbitration (which has been upheld by courts as a bar to class action litigation).

¹ For players who are minors under the applicable state law, parental consent would also be necessary to have “informed consent.”

² A high-level review of the variations in state laws can be found in *Why COVID-19 liability waivers will not save college football in 2020*, USA Today (August 11, 2020) (by Mark Shofield).

Premise #4:

To the extent a state's laws place significant limitations on the rights of parties to limit or shift risk through such contractual provisions, state legislatures have the ability to convene outside of a regular session and pass emergency legislation modifying state law or creating an exception applicable to a particular set of circumstances.

Action Items

1. Seek buy-in from stakeholders
 - a. Players and their parents
 - b. Conference Commissioners
 - c. Member institution Presidents
 - d. ADs
 - e. Head Coaches
2. Stakeholders petition NCAA Board of Governors to rescind its ban on liability waivers
3. NCAA rescinds directive banning liability waivers
4. Member institutions retain legal counsel within their state to draft a "liability waiver" that includes terms regarding Covid-19 that plainly and thoroughly explain all known risks of being infected and the known and potential long-term health effects, limits or extinguishes liability for negligence, disavows player's reliance on statements outside the contract made by the school or its representatives, requires player to knowingly assume risks of infection and consequences thereof, requires mandatory arbitration, confirms player's decision to seek advice from his own legal counsel or waiver thereof, preserves scholarships and all other benefits provided by the school, and requires that the student-athlete's (and, if applicable, their parent's or guardian's) signature be witnessed by a notary public.
5. Member institutions manage the process of offering players the ability to play in Fall 2020 by signing a "liability waiver" while preserving the rights of student-athletes who choose not to execute a waiver.³
6. Gameday

³ If necessary, member institutions may seek legislative relief in their home state from statutory restrictions on "liability waivers."