

Strong Athletic Compliance Programs: A Win-Win for Athletic Departments and Universities

Universities can minimize risk by developing a compliance program with a few essential attributes.

Collegiate athletic departments are increasingly under fire for compliance-related concerns, including allegations of mishandling sexual assault complaints, abusive coaching practices and findings of widespread academic fraud. Such allegations present significant reputational, financial and legal risk for the institutions.

Attention to alleged bad behavior off the field — and to how such allegations are handled — can cause downstream repercussions for recruiting, brand allegiance and fundraising. Perhaps more importantly, these alleged incidents, regardless of size, scope or outcome, detract from a university's ability to focus on its primary objectives: educating young adults and maintaining the institution's integrity for its alumni population and supporters.

Universities can minimize this risk by developing a compliance program with a few essential attributes, as we discuss in this paper.

A matter of governance — and, increasingly, liability

Due to the groundswell of attention these issues now receive, managing conduct and promoting integrity within athletic departments are increasingly becoming matters of high-level university governance.

And there are growing efforts to hold universities liable for the failure to provide such governance. For example, a northeastern university recently agreed to pay US\$1.225 million to settle the claims of five current and former female students who alleged that the university responded to their reports of sexual assault with indifference.¹ Another university is facing civil litigation for allegedly showing indifference to, and failing to investigate, a sexual assault by a student basketball player.²

Clearly, the need to establish and implement an effective compliance program is no longer limited to the corporate sector. Government enforcement efforts have long since taught the corporate sector to prioritize establishing effective compliance programs. However, this is a new lesson for universities, which only recently began to endure close scrutiny of their compliance programs, especially within their athletic departments.

Given the unique circumstances facing academic institutions, a compliance program should be robust and comprehensive, but sufficiently flexible to address “hot button” issues which are not typically covered under standard legal compliance structures. And, while most universities do have an athletic compliance

officer, depending on his or her reporting structure, duties and responsibilities, this position alone likely is not sufficient.

When perception becomes reality

Due to the high-profile nature of collegiate athletic programs, universities are vulnerable to public perception — whether justified or not — of mismanaging allegations of misconduct in an effort to protect their athletic programs.

Such behavior is understandable. Strong athletic programs are a critical source of school pride and brand recognition and, accordingly, revenue and alumni support. In some institutions, loyalty to the university's athletic programs is so intense as to foster a "sports as king" mentality, wherein misconduct, or even potentially criminal behavior, of athletes and coaches are excused — or at least seen to be.

In a recent report, the Association of Governing Boards of Universities and Colleges (AGB) called for university governing boards to exercise greater oversight over intercollegiate athletics. The AGB noted that "powerful interests that benefit financially from big-time sports, as well as fans and booster clubs with emotional investments, can distort the clarity of mind required for effective governance."³

The benefits of a strong compliance program

A strong, customized compliance program can go a long way toward staving off criticisms of mismanagement of damaging allegations and preventing problems from the outset.

Compliance programs are more than just an added layer of red tape. When designed and implemented correctly, these programs can be valuable tools for mitigating risk and creating a compliance-minded culture — one which facilitates the institution's mission.

A consistent approach to incident response can provide a level of defensibility around the university's actions. Such an approach can also give university administrators the confidence that they are making appropriate, informed decisions, even in high-pressure situations in which facts may still be murky.

An effective compliance program is also a signal to external parties — regulatory or otherwise — that, regardless of the outcome, the institution has identified, assessed and resolved the incident in good faith through a robust, structured process.

Developing a compliance framework tailored to the athletic program's needs will also allow the university to address a broader range of conduct-related issues, while simultaneously developing a culture of athletic integrity.

Many universities choose to engage external third parties to help design and implement their compliance programs. Such a choice can enable the institution to continue to focus on its key objectives and expertise while building confidence among stakeholders that the university is serious about governing these issues.

The top three elements of an effective compliance program

An effective, robust compliance program generally is not developed from an "off-the-shelf" model. It must be tailored to the unique needs and circumstances of a given university.

As every allegation, incident, or crisis inevitably will be unique, a compliance program must also be sufficiently flexible to address varying incidents. A flexible framework should encourage incident reporting and contain a structure for managing, escalating and responding to issues and allegations as they arise.

Although the minutiae of programs will vary, universities should keep in mind certain key, overarching principles when developing effective compliance programs:

(1) Independence and objectivity

A compliance program should be developed in a manner that minimizes the appearance of any conflict of interest. This will vary by program, but at a minimum, it should require that investigations involving members of an athletic program — including student-athletes, coaches, and staff — are handled outside of the athletic department. Athletic departments typically do not have the expertise to handle investigations of this nature, and a department's involvement in investigations is likely to draw questions of objectivity.

Indeed, the Executive Committee of the National Collegiate Athletic Association recently released a handbook passed a resolution on Sexual Violence Prevention and Complaint Resolution.⁴ Among other recommendations, it advises that an athletic department must “cooperate with but not manage, direct, control or interfere with college or university investigations into allegations of sexual violence, ensuring that investigations involving student-athletes and athletics department staff are managed in the same manner as all other students and staff on campus.”

Other mechanisms can reinforce adequate independence. For example, a program may mandate that the director of compliance have direct access to the Board of Trustees. In cases involving more severe concerns, or those with the potential to garner greater public attention, engaging third-party investigation and compliance experts can lend additional legitimacy and apparent objectivity to the incident response — as well as demonstrate the importance the university has placed on appropriately addressing the issue.

Swift, objective and consistent action signals that the institution values all students and staff equally and does not bend the rules for student-athletes or coaches. Further, proper management of malfeasance is a sign of institutional integrity and reinforces the message that athletic department revenues do not excuse improper behavior.

(2) Commitment to implementation

Compliance is not just a “check-the-box” exercise. An entire organization — from the Board of Trustees and president, to the high school student about to sign a commitment letter — must know about, understand and engage with a compliance program.

Critical to a successful program is the “tone at the top.” A compliance program on paper is useless without a credible commitment from a university's governing bodies and senior officials to enforce and follow through with the commitments contained therein. Similarly, even the best designed program is meaningless if university leaders fail to communicate it to the university population.

Hence, in designing a compliance program, a university should establish a mechanism to announce to all stakeholders its intent to implement a program — and enforce its provisions — while explaining the rationale and value behind the program.

Any compliance program should also provide for ongoing dialogue with stakeholders. A reporting line from the director of compliance directly to the Board of Trustees, mandatory training at all levels, and routine program audits also reinforce the commitment to compliance — and reassure stakeholders that a program is functioning.

(3) A clear and safe reporting environment, and a mechanism for escalation

Frequently, an incident draws publicity because the allegations initially went unreported or were unaddressed.

A functioning compliance program must contain effective reporting mechanisms in which students, staff and faculty feel they can report their concerns safely and easily. Students may, for example, fear raising complaints about a popular coach or student-athlete, especially if the complaining students would be required to speak with a university administrator. But an anonymous hotline and/or appointed student ombudsman could provide students with a more comfortable reporting environment. At a minimum, a compliance program should contain an anti-retaliation policy.

Additionally, not every allegation will require a full-fledged investigation; in fact most will not. But a strong and dynamic compliance program will contain mechanisms necessary to:

- Identify red flags
- Establish escalation criteria and protocols
- Provide guidance on when third-party investigators are necessary

These elements will ensure that incidents receive the appropriate level of attention.

Conclusion

When significant incidents at universities — especially ones relating to athletics — play out in public, the institutions can face considerable reputational, financial and even legal exposure.

While a strong athletic compliance program will never eliminate risk, it can reduce the risk and severity of any damage.

Maintaining such a program not only enables universities to abide by the law, it also reinforces fundamental values for the school, students, alumni and financial supporters — while not detracting from the institution's guiding mission of educating young people and preparing them for the world beyond the campus.

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

Sarah M. Gragert, Associate, Latham & Watkins
sarah.gragert@lw.com
+1.202.637.3368
Washington, D.C.

Katherine Wisniewski, Manager, PwC
kate.wisniewski@us.pwc.com
+1 703 307 0947
San Francisco, CA

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Endnotes

- ¹ Complaint, *Luby et al., v. Univ. of Conn.* No. 3:13-cv-1605 (D. Conn, filed Nov. 1, 2013). Settlement agreement available at: <http://today.uconn.edu/blog/2014/07/uconn-announces-resolution-of-title-ix-litigation/>
- ² See e.g., *Ross v. the Univ. of Tulsa*, 4:2014cv00484 (N.D. Okla. Aug. 18, 2014)
- ³ Association of Governing Boards of Universities and Colleges, "Trust, Accountability, and Integrity: Board Responsibilities for Intercollegiate Athletics," at p. 2 (2012), available at <http://agb.org/reports/2012/trust-accountability-and-integrity-board-responsibilities-intercollegiate-athletics>.
- ⁴ Available at <http://www.ncaa.org/sites/default/files/Sexual-Violence-Prevention.pdf>