

# New Jersey Fair Play Act Creates an Uneven Playing Field for Lawyers

## Athlete Agents for College Students Held to Different Standard

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**T**he New Jersey Fair Play Act may be a home run for student-athletes at New Jersey institutions, but is it a foul ball for the New Jersey lawyers who represent them? Gov. Phil Murphy signed the Fair Play Act into law on Sept. 14, 2020, to allow “collegiate student-athletes to earn compensation for use of name, image, or likeness” without affecting scholarship eligibility.<sup>1</sup> The new law sensibly allows athletes attending four-year colleges or universities in New Jersey to obtain “professional representation in relation to contracts or legal matters including, but not limited to, representation provided by athlete agents or legal representation provided by attorneys.”<sup>2</sup>

Unfortunately, the Fair Play Act provides no licensing uniformity for attorneys and athlete agents who provide representation to student-athletes. For attorneys, it mandates that “legal representation obtained by the student-athlete shall be from attorneys licensed by the State.”<sup>3</sup> An attorney is listed as a licensed person by statute in New Jersey.<sup>4</sup> An athlete agent is not.<sup>5</sup> Thus, the Fair Play Act has no state-mandated

license requirement for athlete agents and they need only comply with “the federal ‘Sports Agent Responsibility and Trust Act’ (15 U.S.C. s.7801 et seq.) [SPARTA] in their relationship with student-athletes.”<sup>6</sup>

Having a law license means that certain underlying requirements have been met, such as a background check by the New Jersey Board of Bar Examiners, passing the New Jersey bar exam and paying an annual registration fee. Once licensed, an attorney must fulfill continuing legal education requirements and adhere to the New Jersey Rules of Professional Conduct. Malpractice insurance is also required. Failure to comply with any of these requirements could result in disciplinary action and even revocation of the law license. Athlete agents are not obligated by these or any other requirements under the Fair Play Act. There is no athlete agent registration requirement. There is no malpractice insurance requirement. There is nothing except compliance with SPARTA. An athlete agent is defined under SPARTA as “an individual who enters into an agency contract with a student athlete, or directly or indirectly recruits or solicits a student athlete to enter into an agency contract, and does not include a spouse, parent, sibling, grandparent, or guardian of such student athlete, any legal counsel for purposes other than that of representative agency, or an individual acting solely on behalf of a professional sports team or a professional sports organization.”<sup>7</sup> SPARTA allows anyone to work as an athlete agent, regardless of their education, experience or training. The regulatory vacuum for athlete agents creates a significantly higher tolerance for athlete agent incompetence and misconduct than it does for attorneys representing student-athletes.

The problem is best illustrated by an example. Under the Fair Play Act, an attorney licensed to practice in Califor-

nia for 20 years cannot represent a Rutgers student-athlete without either obtaining their New Jersey law license or retaining New Jersey co-counsel. Yet, an inexperienced college student with a high school diploma and some college credits who has declared themselves a sports agent in compliance with the Fair Play Act can represent that same Rutgers student-athlete. Essentially, the Fair Play Act authorizes anyone to call themselves a sports agent and represent a student-athlete at a New Jersey institution with little to no regard for education, competence, or ethical standards, and with no oversight or enforcement.

There are thousands of people who call themselves sports agents. Many of them are competent, ethical and skilled at counseling their athlete clients on professional sports contracts and endorsement deals. They may not have attended law school, though many have. Some have undergraduate degrees in business, accounting and marketing. Many successful agents trained under or utilized an established agent’s knowledge and experience to navigate the professional sports landscape. Almost all sports agents are required by statute to be licensed in their home state and the states where they recruit and represent players under the Uniform Athlete Agents Act or the Revised Uniform Athlete Agents Act. Not so in New Jersey, where the Fair Play Act disregards licensing conformity and student-athlete protection against unqualified athlete agents.

### **Uniform Athlete Agents Act and the Revised Uniform Athlete Agents Act**

The UAAA and the RUAAA require anyone who wants to represent a student-athlete as an agent to register with the state where they represent or recruit athletes. For example, “New York State law defines an Athlete Agent as any person who enters into an agency contract with a student-athlete or, directly or

indirectly, recruits or solicits a student-athlete to enter into an agency contract.”<sup>8</sup> When a person recruits a student-athlete in New York, they are required under Article 39-E of the General Business Law to register as an athlete agent with the New York Department of State. Registration serves as a gatekeeping mechanism and ensures compliance with New York law. New Jersey is one of only a handful of states that does not require registration under the UAAA or RUAAA.<sup>9</sup>

Registration comes with a cost, ranging from \$50 in California, to \$100 in New York, to \$650 in Florida. Other states, like Pennsylvania and Texas, require that the individual agent be bonded in addition to paying the registration fee. The bond offers protection to the athlete if they need to bring a malpractice action against the athlete agent. In almost every state, individual (not organization) registration is required. Generally, registration is conducted and recorded by the Secretary of State. An application must be completed, references provided and fees paid to complete the registration process. Nearly every state conducts a background check and some require fingerprinting as part of the registration process. Once registered, an athlete agent is subject to civil, and sometimes criminal, enforcement of state statutes.

Because New Jersey has not adopted the UAAA and the RUAAA, it has no statutory or regulatory framework to regulate athlete agents. It also has no measures in place to protect student-athletes from unscrupulous athlete agents. Other states, like Alabama, may criminally charge an athlete agent with a felony for an intentional failure to register with the Secretary of State and civil penalties can reach \$50,000. In New Jersey, an aggrieved student-athlete is left with only common law claims, such as breach of the duty of care and the duty of loyalty, against an athlete agent.

## The Sports Agent Responsibility and Trust Act

Unlike a licensed New Jersey attorney who is supervised and subject to discipline by the Office of Attorney Ethics, no enforcement body exists for a sports agent doing business in the state. The Fair Play Act references SPARTA, which Congress passed to protect student-athletes by prohibiting an athlete agent from: (1) providing false or misleading information, or making false or misleading promises or representations; (2) providing anything of value, such as cash or gifts, to the student-athlete or anyone

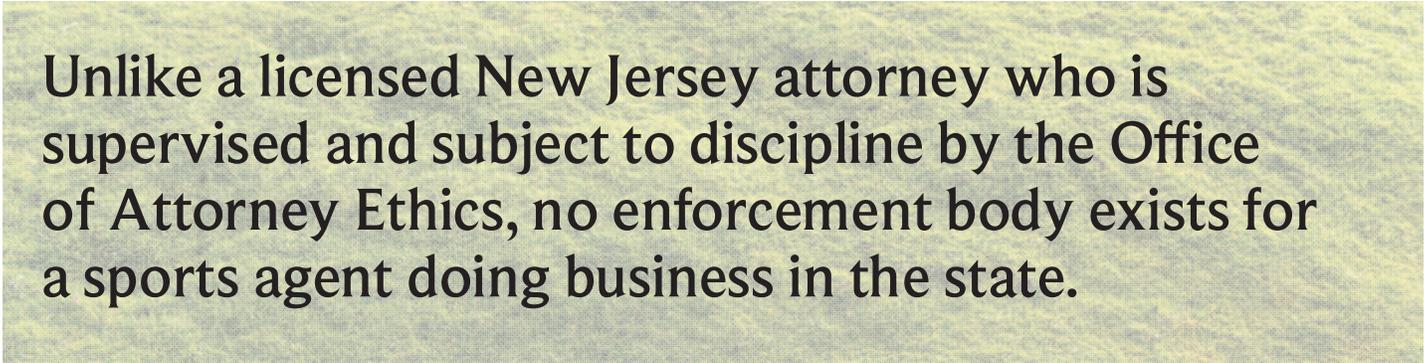
enticing a student-athlete to sign a representation agreement, the athlete agent would be subject to an FTC enforcement action. Under the FTCA, an athlete agent could receive up to an \$11,000 fine if found to have committed an unfair or deceptive act or practice. That fine could easily pale in comparison to the potential fee earned by an athlete agent negotiating a contract involving an athlete's name, image and likeness. SPARTA is often criticized for lacking a true deterrent effect in favor of lucrative gain.

SPARTA also allows a state, through

sports do not have this regulatory inconsistency. Athlete agents and attorneys are required to be licensed and are subject to uniform requirements and regulations set by each players' union in the National Football League, Major League Baseball, the National Basketball Association and the National Hockey League.

### Athlete Agent Requirements and Regulations in the NFL, MLB, NBA and NHL

In addition to SPARTA, the UAAA and the RUAAA, athlete agents in the four



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associated with the student-athlete; (3) failing to provide a written disclosure to the student-athlete that they may lose NCAA eligibility after signing a contract with an athlete agent; or (4) predating or postdating contracts. SPARTA does not mirror the standards a New Jersey attorney is required to follow to be granted and maintain a law license.

The prohibitions in SPARTA are enforced by either federal or state action. The Federal Trade Commission regulates athlete agents under SPARTA. The FTC has enforcement power over athlete agents who misrepresent or provide gifts to a student-athlete to enter into a representation contract under the Federal Trade Commission Act.<sup>10</sup> Congress passed the FTCA to protect consumers and businesses from unfair or deceptive acts in the conduct of business. If an athlete agent is engaging in deceptive or misleading practices in

its attorney general or public university, to bring an enforcement action against an athlete agent under SPARTA.<sup>11</sup> If, however, the FTC pursues an action against the athlete agent, SPARTA prohibits parallel state enforcement against that athlete agent.<sup>12</sup> There is no direct right of action under SPARTA by a student-athlete against an athlete agent. When the attorney general or public university does not take action against an athlete agent, the aggrieved student-athlete has no other recourse. The uneven playing field for attorneys acting as agents under the Fair Play Act is apparent in SPARTA's enforcement mechanisms. An aggrieved student-athlete in New Jersey can file a direct enforcement action against an attorney with the Office of Attorney Ethics. Yet, no parallel private right of action exists for a student-athlete against an athlete agent under SPARTA. Four major U.S.

major professional sports leagues are regulated by each league's professional players association, which are led by a president elected by the players. The rules and regulations for athlete agents in each sport are set by the respective players' associations. The sports leagues do not regulate athlete agents as they are separate entities controlled by team owners and led by a commissioner. The operative document governing the relationship between the respective players' associations and professional sports leagues is a collective bargaining agreement (CBA). Competent and successful athlete agents are fluent in the CBA of a particular sport because it covers the player-team relationship, including player contracts and injury rights and protection. The CBA generally also addresses, in part, a player's ability to sign an endorsement contract for their name, image and likeness. Each of the

four major sports requires a baseline level of knowledge, education and competency for an athlete agent to represent a player. Each sport also has a set of uniform rules and regulations for everyone representing an athlete.

### **NFL**

The National Football League Players Association adheres to the most stringent requirements for those representing professional football players. Prospective athlete agents must submit an application to be accepted to attend a two-day seminar held once per year to learn the relevant sections of the NFL CBA. At the conclusion of the seminar, prospective agents take an exam on the CBA and the NFLPA regulations governing contract advisers, which is the term used by the NFLPA for athlete agents. Once receiving a passing grade, a contract adviser can represent players in contract negotiations with NFL teams. Athlete agents are required to pass a background check, pay a minimum annual fee of at least \$1,500 to the NFL Players Association and secure an insurance policy in their name to cover any potential malpractice.

There is a continued compliance requirement where NFL agents must attend a yearly seminar to stay informed on new developments related to player representation and the CBA. The more difficult compliance requirement, for most of the 900 or so NFL agents, is to have negotiated at least one player contract within a three-year period. If an agent fails to negotiate a NFL contract within three years, they must reapply and retake the agent exam. Once certified, the agent is subject to the discipline by the NFLPA. This could include a fine, suspension and revocation of the NFLPA certification. Unlike the Fair Play Act, NFLPA regulations governing contract advisers hold athlete agents and attorneys to identical requirements and standards.

### **MLB**

The Major League Baseball Players Association also requires an athlete agent to submit an application and pay a \$2,000 fee, sit for an exam held once per year and pass a background investigation. The exam focuses on the MLB CBA and the MLBPA Regulations Governing Player Agents. Once the agent passes the exam, they can be designated as the agent of a Major League Baseball player. This certification is not required for athlete agents who represent baseball players in the development system. A certification is required only to represent a player for a Major League Baseball contract. The MLBPA compliance requirement is similar to the NFLPA requirement of negotiating a MLB contract within three years as well as paying an annual fee. Note that unlike the NFL, a MLB agent cannot be certified until they represent a player who has a MLB contract.

Once certified, the agent is subject to discipline by the MLBPA. This could include a fine, suspension and revocation of the MLBPA certification. Attorneys and athlete agents are subject to the same rules and standards under MLBPA regulations. Unlike the Fair Play Act, everyone has the same requirements, rules and regulations to represent a Major League Baseball player.

### **NBA**

The National Basketball Players Association requires an athlete agent to submit an application and pay a \$250 non-refundable application fee plus a \$1,250 refundable fee covering prorated agent dues. A prospective NBA agent must submit an application to the NBPA, pass a background investigation and sit for an exam held once per year. Similar to football, there is a continued compliance requirement where NBA agents must attend an annual seminar to stay informed of new developments related to player representation, the NBA CBA

and NBPA regulations governing player agents.

An agent must also negotiate and execute at least one player contract within a five-year period. Once certified, the agent is subject to discipline by the NBPA, which could include a fine, suspension and revocation of the NBPA certification. NBA agents, whether a licensed attorney or athlete agent, are equally subject to the NBPA regulations.

### **NHL**

The National Hockey League Players Association does not require an exam. NHLPA Agent Regulations require a \$500 application fee to submit with the application and supporting documents that detail a prospective agent's education, background, previous business dealings and current business and personal relationships. The application undergoes a thorough review process by NHLPA staff, which could include an investigation into prior conduct. There is an annual fee in excess of \$2,000 as well as a requirement to represent a NHL player under contract to a NHL club or a player having had a contract with a NHL club who has become a free agent. Once certified, the agent is subject to discipline by the NHLPA. This could include a fine, suspension and revocation of the NHLPA certification. Once again, and consistent with the other sports, there is no deviation between requirements and regulations for attorneys and athlete agents. All are subject to the uniform set of NHLPA rules and regulations.

## **Application, Practice and Enforcement**

Each of the four sports has a heightened level of compliance required to represent athletes. There is an application requirement, a compliance requirement and an enforcement mechanism to regulate anyone representing an athlete, whether it is an attorney or an athlete agent. New Jersey's Fair Play Act

lacks these three important prongs for athlete agents. There is no application required to be an athlete agent. There is no compliance requirement for an athlete agent. There is no uniform enforcement procedure for an athlete agent. There is also no insurance requirement to safeguard a student-athlete's recovery of damages if an enforcement action is taken against an athlete agent in New Jersey.

Yet these three prongs exist for attorneys licensed to practice in New Jersey. The Fair Play Act specifically states that an attorney must be licensed to practice in New Jersey thereby mandating an

application requirement, compliance requirement, and enforcement mechanism with an insurance requirement. The Fair Play Act's lack of uniformity to regulate athlete agents and attorneys is harmful to the New Jersey college athletes who must choose representation without a uniform set of standards and protections. ⚖️

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#### Endnotes

1. S-971/A/2106 (2020)
2. *Id.*
3. *Id.*
4. N.J.S.A. 2A §53A-26

5. *Id.*
6. S-971/A/2106 (2020)
7. 15 U.S.C. §7801
8. [dos.ny.gov/licensing/athleteagent/athleteagent.html](https://dos.ny.gov/licensing/athleteagent/athleteagent.html)
9. Lens, Josh, Application of the UAAA, RUAAA, and State Athlete-Agent Laws to Corruption in Men's College Basketball and Revisions Necessitated by NCAA Rule Changes (May 27, 2019). 30 Marq. Sports L. Rev. 47, 49-50 (2019).
10. 15 U.S.C. §7803
11. 15 U.S.C. §7804
12. *Id.*



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