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LABOR PAINS: THE EFFECT OF A WORK STOPPAGE IN THE NFL ON ITS COACHES

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&
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National Football League (NFL or the “League”) coaches stand to be significantly impacted by the on-going and potentially contentious negotiations between NFL owners and players over a new collective bargaining agreement, which might lead to a work stoppage before the 2011 season.

I. INTRODUCTION

The NFL Collective Bargaining Agreement (CBA) governs the terms and conditions of employment between the NFL owners and the NFL Players’ Association.¹ The current CBA was entered into as of March 8, 2006.² The NFL owners have complained that its provisions are too generous to players. In May of 2008,³ the NFL owners exercised their rights under the CBA to

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1. See generally NAT’L FOOTBALL LEAGUE, NFL COLLECTIVE BARGAINING AGREEMENT 2006-2012 (2006), available at <http://www.nflplayers.com/About-Us/CBA-Download/>.

2. Jarrett Bell, *NFL Owners Accept Player Union Proposal With 30-2 Vote*, USATODAY.COM, Mar. 8, 2006, http://www.usatoday.com/sports/football/nfl/2006-03-08-labor_x.htm.

3. *NFL Owners Opt Out of CBA*, NFL.COM, <http://www.nfl.com/news/story?id=09000d5d80868>

notify the NFL Players Association (NFLPA) they were terminating the final two League Years of the CBA that provided a salary cap (2010 and 2011).⁴ The CBA defines a League Year as “the period from March 1 of one year through and including the last day of February of the following year.”⁵ Consequently, the 2010 NFL playing season will be the last playing season under the CBA, and during the 2010 League Year there will not be a salary cap.⁶ Pursuant to the terms of the CBA, the 2011 College Draft will be the final activity under the current CBA.⁷

The uncapped 2010 NFL League Year is now a reality.⁸ In the wake of an uncapped year, there is realistic potential for a work stoppage sometime after March 1, 2011.⁹ NFLPA Executive Director DeMaurice Smith recently warned that, “I think it’s virtually impossible to go back to a cap system if we go to an uncapped year.”¹⁰ Following up on that point, Executive Director Smith predicted the likelihood of a 2011 lockout as a fourteen on a scale of one-to-ten.¹¹ Although DeMaurice Smith’s prediction of a lockout pertains to a negotiation tactic outside of the union’s control, it nonetheless offers insight on the NFLPA’s level of confidence in smooth labor negotiations.

This Article considers the effect of a work stoppage in the NFL on its coaches, who are non-unionized employees of the League’s thirty-two clubs. Part I introduced the circumstances that portend a work stoppage in the NFL. Part II briefly chronicles the work stoppage history in this country’s four primary team sport leagues: Major League Baseball (MLB), the National Basketball Association (NBA), the National Hockey League (NHL), and the NFL, and discusses other financial, legal, and market considerations relevant to an NFL work stoppage. Part III posits facts and assumptions relevant to NFL coaches in the context of a work stoppage. Part IV surveys the clubs’ contractual treatment of coaches during a work stoppage and offers suggestions for reaching fair and well-considered work stoppage provisions.

b78&template=without-video&confirm=true (last visited Mar. 24, 2010) [hereinafter *NFL Owners*].

4. NAT’L FOOTBALL LEAGUE, *supra* note 1, at art. LVIII, § 3.

5. *Id.* at art. I, § 1(g).

6. *NFL Owners*, *supra* note 3. At the time of this writing, NFL owners and NFL players were not engaged in meaningful negotiations on a new CBA with less than two weeks left in the 2009 League Year.

7. NAT’L FOOTBALL LEAGUE, *supra* note 1, at art. XVI, § 1.

8. Steve Wyche, *League, Union Continue Talking, But Uncapped Year a Near Certainty*, NFL.COM, <http://www.nfl.com/news/story?id=09000d5d81695a40&template=with-video-with-comments&confirm=true> (last visited Mar. 25, 2010).

9. *Id.*

10. Gary Mihoces, *Townshend Defends Himself vs. Critics*, USA TODAY, Feb. 5, 2010, at 5C.

11. *Id.*

Part V proposes a future league-wide remedy to reduce or eliminate the primary issues presented.

II. STRIKES AND LOCKOUTS IN OTHER PROFESSIONAL LEAGUES

“Lockouts occur when employers attempt to put economic pressure on employees by refusing to allow them to work.”¹² There is no statutory right of employers to lock out.¹³ “On the other hand, the right to strike is protected under 29 U.S.C. § 163.”¹⁴ Yet, the Supreme Court, the lower federal courts, and the National Labor Relations Board (NLRB) have recognized the legitimacy of lockouts.¹⁵ “An employer’s right to lock out is reciprocal of a union’s right to strike, and necessarily encompasses the right to refrain from paying during the lockout.”¹⁶

There are two types of lockouts:

Offensive lockouts occur when an employer locks out its employees in order to pressure them to reach an agreement on terms favorable to the employer . . . [d]efensive lockouts occur when an employer locks out its employees to avoid potential harm to the employer’s business, property, or goodwill that may be caused by an opportunistic strike called at the time of a union’s choosing . . . [w]hether offensive or defensive, the lockout is a tried and true means for an employer to seize the initiative in a labor dispute.¹⁷

The fact that the NFL’s CBA expired early as a result of the NFL’s opt out does not impact the owners’ right to lock out the players. “In other words, reopen bargaining and bargaining when no contract is in effect [are] on equal footing with respect to the availability of economic weapons.”¹⁸

The history of labor relations in this country’s professional sports leagues

12. Grant M. Hayden, *Some Keys to the NBA Lockout*, 16 HOFSTRA LAB. & EMP. L.J. 453, 454 (1999). For a concise discussion of the legal status of a lockout, see ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 355-62 (1976).

13. In the Matter of Nat’l Basketball Players Ass’n and Nat’l Basketball Ass’n (Lockout Arbitration, Opinion and Award), *reprinted in* HOWARD L. GANZ & PRACTICING LAW INSTITUTE, UNDERSTANDING BUSINESS & LEGAL ASPECTS OF THE SPORTS INDUSTRY 110 (1999) [hereinafter *In the Matter of NBPA and NBA*].

14. *Id.*

15. *Id.* at 112.

16. *Id.*

17. Hayden, *supra* note 12, at 455.

18. *In the Matter of NBPA and NBA*, *supra* note 13, at 147.

offers important context from which to consider the likelihood, timing, and duration of a 2011 NFL work stoppage. While the details of each labor dispute chronicled below can be distinguished by a host of factors, at the core of every labor dispute in professional sports is each party's perception of economic fairness. At the heart of every recent settlement of a professional sports labor dispute is a collective bargaining agreement with a revenue apportionment vehicle between owners and players, and sometimes among owners as well.

A. Major League Baseball

The advent of collective bargaining in United States professional sports began in 1968 between the owners and players in MLB.¹⁹ In each of the next eight labor negotiations between MLB and the Major League Baseball Players' Association (MLBPA), there were eight consecutive work stoppages.²⁰ Baseball's eight work stoppages:

Year	Work Stoppage	Length (Days)	Games Lost
1972	Strike	14	86
1973	Lockout	12	0
1976	Lockout	17	0
1980	Strike	8	0
1981	Strike	50	712
1985	Strike	2	0
1990	Lockout	32	0
1994-95	Strike	234	912

Not surprisingly, the primary impetus for each of these work stoppages was management's attempts to slow salary escalation.²¹ Only three of the eight MLB work stoppages have resulted in lost games, with the most recent work stoppage resulting in the loss of 912 total games and the cancellation of the World Series for the first time in ninety years.²² The MLBPA was not the

19. Major League Baseball Players Association, *History of the Major League Baseball Players Association*, MLBPLAYERS.COM, <http://mlbplayers.mlb.com/pa/info/history.jsp> (last visited Mar. 25, 2010).

20. *Labor Pains*, CNNSI.COM, http://sportsillustrated.cnn.com/baseball/news/2002/05/25/work_stoppages/ (last visited Mar. 25, 2010).

21. *See id.*

22. *Id.*

only union with a contentious labor history with MLB's owners.

A year after the MLBPA negotiated its first CBA, the NLRB certified the Major League Umpires Association (MLUA).²³ The MLUA was "the first certified professional sports officials' union in America."²⁴ Less than a year after their certification, MLUA called its first labor strike.²⁵ Many more strikes followed over the next twenty-five years, and in 1995 MLB locked the MLUA out of the first half of the 1995 season.²⁶ The lockout ended when challenging negotiations led to a new CBA that provided, among other terms, a no-strike clause and for the CBA's termination at the end of the 1999 season.²⁷ Renegotiating this CBA spawned perhaps the most unique and ill-fated attempt in sports labor law history to preempt a lockout.

During the summer of 1999, MLUA believed that MLB's reluctance to negotiate a new deal signaled its intention to lock out the union.²⁸ So, in an effort to prompt negotiations, MLUA implemented a novel plan that called for the resignation of its members effective September 2, 1999.²⁹ On July 15, 1999, fifty-seven of MLUA's sixty-eight members submitted their resignations.³⁰ The MLUA hoped to leverage two hardships against MLB: (1) the challenge of replacing entire umpire crews across the league in the last month of the season; and (2) forcing the payment of over fifteen million dollars in termination pay demanded as part of each umpire's resignation.³¹ The resignation plan failed measurably as all fifty-seven rescinded their resignations within a week of their submission.³² Not only did the negotiation ploy fail to encourage, let alone force the owners to negotiate, but also by the end of July 1999, MLB had hired twenty-five new umpires.³³ Although most of the resigning umpires were reinstated, the net result of the MLUA resignation plan left "at least ten umpires permanently out of an officiating job," nine umpires jobless for over two years, the firing of MLUA's chief

23. Frederick Alcaro, *When In Doubt, Get Locked Out!: A Comparison of the 2001 Lockout of the National Football League Referees' Association and the Failed 1999 Resignation Scheme of the Major League Baseball Umpires' Association*, 5 U. PA. J. LAB. & EMP. L. 335, 341 (2003).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 340-41.

28. *Id.* at 341 (citing Peter Schmuck, *Umpires Spurred by Fear of Lockout: McKean: Union's Threat of Sept. 2 Resignation is Bid 'To Force the Issue'*, BALT. SUN, July 16, 1999, at D7).

29. *Id.* at 342.

30. *Id.*

31. *See id.*

32. *Id.* at 343.

33. *Id.*

negotiator,³⁴ and the formation of a new MLB umpires' union, the World Umpires Association.³⁵ MLB's acrimonious labor disputes of the 1990s have yielded to a recent ten-plus year history without a work stoppage involving the players or the umpires for the first time since the 1960s.³⁶

B. National Basketball Association

The Boston Celtics' Bob Cousy began to organize NBA players in 1954.³⁷ For the next forty years, the NBA did not experience a work stoppage.³⁸ The NBA's first work stoppage began on July 1, 1995, when its owners locked out the players.³⁹ The lockout lasted seventy-four days in the 1995 off-season.⁴⁰ During the lockout, NBA clubs were prohibited from negotiating or signing contracts with free agents or recently drafted rookies.⁴¹ Summer leagues and tryouts were halted and players were not permitted in club facilities.⁴² NBA players ultimately reached an agreement with NBA owners within three days of the players' vote against decertifying the NBPA union.⁴³ Labor peace would not last long.⁴⁴

In March 1998, the NBA exercised its option to terminate the 1995 CBA at the conclusion of the then current season.⁴⁵ The NBA again locked out its players on July 1, 1998; but, unlike its previous off-season lockout, this lockout lasted 204 days, resulting in an abbreviated fifty-game 1998-99 season

34. *Id.* at 344.

35. The World Umpires Association was certified by the NLRB on February 24, 2000. Barry M. Bloom & Tom Singer, *Umpires Ratify Labor Agreement*, MLB.COM, Jan. 19, 2010, http://mlb.mlb.com/news/article.jsp?ymd=20100119&content_id=7934990&vkey=news_mlb&fext=.jsp&c_id=mlb&artnerId=rss_mlb.

36. *Id.*

37. Ryan T. Dryer, *Beyond the Box Score: A Look at Collective Bargaining Agreements in Professional Sports and Their Effect on Competition*, 2008 J. DISP. RESOL. 267, 274 (2008).

38. See Marc J. Yoskowitz, *A Confluence of Labor and Antitrust Law: The Possibility of Union Decertification in the National Basketball Association to Avoid the Bounds of Labor Law and Move Into the Realm of Antitrust*, 1998 COLUM. BUS. L. REV. 579, 607 (1998).

39. *NBA Locks Out Players First Work Stoppage in League History; No Talks Scheduled*, SEATTLE TIMES, July 1, 1995, at B1 [hereinafter *NBA Locks Out Players*].

40. See *NBA Lockout Chronology*, CNNSI.COM, Jan. 6, 1999, http://sportsillustrated.cnn.com/basketball/nba/news/1999/01/05/lockout_chronology/.

41. *NBA Locks Out Players*, *supra* note 39.

42. *Id.*

43. Robert Bradley, *Labor Pains Nothing New to the NBA*, APBR.ORG, <http://www.apbr.org/labor.html> (last visited Mar. 29, 2010).

44. See *NBA Lockout Chronology*, *supra* note 40.

45. *Id.*

and the cancellation of that season's popular NBA All-Star game.⁴⁶ As before, NBA clubs were barred from making player transactions and holding workouts.⁴⁷ Notably, during the lockout the players brought a grievance seeking payments pursuant to guarantee provisions in their contracts.⁴⁸ Specifically, the grievance arbitration found "that the non-payment of wages or salaries for work withheld during a lawful lockout to be a component of the right to lock out."⁴⁹ Thus, the NBA clubs had no obligation to make payments on guarantee clauses when the players' contracts extended beyond the term of the CBA and where such contracts were silent on the subject of lockouts.⁵⁰

Currently, the NBA has to decide by December 15, 2010, whether to extend the current CBA through the 2011-12 season.⁵¹ Without an extension, the NBA's current CBA expires on June 30, 2011.⁵² Recently, Sacramento Kings Guard Bobby Jackson publicized the importance of re-educating work stoppage neophytes about the NBA's most recent labor pains—a lockout that happened during an economic boom.⁵³ Jackson's warning probably captures the concern of many professional players and owners across the NBA, as well as MLB, the NHL, and the NFL regarding the potential costs of a protracted work stoppage in a fragile economy.

C. National Hockey League

There have been three work stoppages in the National Hockey League: a ten-day in-season strike in 1992 and two lockouts.⁵⁴ The first lockout began during the 1994-95 season and caused the loss of thirty-six regular season games.⁵⁵ The 2004-05 lockout, which began the first day of the NHL League Year, lasted a few months short of a calendar year and caused the loss of the

46. Steve Aschburner, *Lockout Revisited, 10 Years Later*, CNN.COM, July 8, 2008, http://sportsillustrated.cnn.com/2008/writers/steve_aschburner/07/08/lockout.revisited/index.html.

47. Mike Wise, *BASKETBALL; It's Their Ball, and N.B.A. Owners Call for Lockout*, NYTIMES.COM, June 30, 1998, <http://www.nytimes.com/1998/06/30/sports/basketball-it-s-their-ball-and-nba-owners-call-for-lockout.html>.

48. *In the Matter of NBPA and NBA*, *supra* note 13, at 91.

49. *Id.* at 145.

50. *Id.* at 157-59.

51. *NBA, Players Union Hold First Talks Regarding New CBA*, SPORTSBUSINESSDAILY.COM, Aug. 5, 2009, <http://www.sportsbusinessdaily.com/article/132289>.

52. *Id.*

53. Chris Tomasson, *Second Lockout Could Be On Horizon*, ROCKY MOUNTAIN NEWS, Jan. 23, 2009, at 6.

54. Paul D. Staudohar, *The Hockey Lockout of 2004-05*, 128 MONTHLY LAB. REV. 23, 24 (2005).

55. *Id.*

entire 2004-05 season.⁵⁶ The 2004-05 lockout is notable not only for its duration as the longest lockout in United States sports history, but also because it is the most recent lockout in professional sports and was choreographed by Bob Batterman, the attorney recently retained as labor counsel to the NFL.⁵⁷ Another striking similarity between the NHL and NFL is the NFL's claim—copiously challenged—that each NFL club lost money in 2009.⁵⁸ For those NFL clubs that have experienced a substantial reduction in profits, let alone operating losses, a lockout that reduces the club's primary operating expense becomes a most attractive negotiating strategy. For those clubs that operate with bold margins, the opportunity costs of a lockout may not only stimulate cooperation with the players, but also among other owners in the form of revenue sharing.

D. National Football League

The NFL currently enjoys the longest period of labor peace between players and owners among our country's four major professional team sports.⁵⁹ But the environment of the NFL's impending labor disputes resembles the NFL's prior labor squabbles in at least one critically important respect—there will, beginning in 2010, be no existing framework for sharing the NFL's revenues between the owners and players and among the owners themselves after 2011.⁶⁰

“The NFL has had three strikes in its history.”⁶¹ The NFL's first strike occurred in the 1974 preseason and lasted for forty-one days without the loss

56. *Id.* at 23.

57. Brian Baxter, *Proskauer's Bob Batterman Signals a Labor War in the NFL*, AMLAWDAILY.COM, May 21, 2008, <http://amlawdaily.typepad.com/amlawdaily/2008/05/smashmout-h---p.html>.

58. Scott Brown & Carl Prine, *Union Chief: NFL Headed for Lockout*, PITTSBURGH TRIB., Aug. 19, 2009, available at http://www.pittsburghlive.com/x/pittsburghtrib/sports/steelers/print_638933.html.

59. Jarret Bell, *Lockout, Labor War Loom Over NFL as Uncapped 2010 Begins*, USATODAY.COM, Mar. 3, 2010, http://www.usatoday.com/sports/football/nfl/2010-03-02-lockout-labor-war-loom-over-nfl-uncapped_N.htm. The NFL adopted its salary cap system as part of the settlement of various NFL players' antitrust class action lawsuits. The League's salary cap system has been the foundation for extending the CBA without a work stoppage since 1993. AARON N. WISE & BRUCE S. MEYER, *INTERNATIONAL SPORTS LAW AND BUSINESS* 103-04 (1997).

60. *NFL to Cut \$100 Million Annual Revenue-Sharing Program*, NFL.COM, <http://www.nfl.com/news/story?id=09000d5d814bea04&template=with-video-with-comments&confirm=true> (last visited Mar. 29, 2010).

61. *A Strike vs. A Lockout*, NFLPA.COM, <http://www.nflplayers.com/Articles/CBANews/A-Strike-vs-A-Lockout> (last visited March 2, 2010).

of a regular season game.⁶² In 1982, the NFL players went on strike for fifty-seven days, and the League played an abbreviated nine-game regular season.⁶³ The NFL's 1987 strike was also an in-season work stoppage that lasted twenty-four days and resulted in the cancellation of the games scheduled for the third week of the season and the next three week's games being played by replacement players.⁶⁴

While the NFL's players have never experienced a lockout, NFL owners have recent experience with a lockout. After almost six months of unsuccessful off-season negotiations between the NFL and its officials, the National Football League Referees' Association (NFLRA), the NFL locked out its officials.⁶⁵ Replacement officials from the ranks of college football, the Arena League, and NFL Europe called the final 2001 preseason games and the game on September 9, 2001, "season openers."⁶⁶ Two days later, the September 11, 2001 tragedy shook the country, providing the NFLRA with a new appreciation for the importance of returning to work.⁶⁷ Consequently, on September 19, twenty-two days into the lockout, the NFLRA accepted what amounted to the NFL's most recent offer, and the lockout ended.⁶⁸ While the impact of the 9/11 tragedy on the NFLRA's decision to accept the NFL's offer cannot be understated, history will recognize that this lockout ended favorably for NFL owners.

E. Other Relevant Considerations

1. Market Factors.

A host of financial, legal, and market conditions will influence the League's labor negotiations; some marry the interests of clubs and players, others encourage their divide.

a. War Chests

NFL team owners receive guaranteed revenue every year.⁶⁹ In 2009, each

62. *Id.*

63. Dennis Coates & Brad R. Humphreys, *The Economic Consequences of Professional Sports Strikes and Lockouts*, 67 S. ECON. J. 737, 738 (2001).

64. *Id.*

65. Alcaro, *supra* note 23, at 338-40.

66. *Id.* at 339-40.

67. Edward Wong, *N.F.L. Officials Approve Pact and Will Be Back Sunday*, N.Y. TIMES, Sept. 20, 2001, at D4.

68. Alcaro, *supra* note 23, at 340.

69. Interview with Michael Cramer, former president, chief operating officer, and minority

team owner collected approximately \$125 million in guaranteed revenue from all sources (i.e. media and properties).⁷⁰ A significant portion of that money came from the NFL's contracts with DIRECTV, which runs from 2011-2014, and pays each team about \$30 million a year, regardless of if there is a work stoppage.⁷¹ NFLPA Chief DeMaurice Smith estimated the aggregate broadcast revenue for the League in 2011 at \$5 billion, even if no games are played in that season.⁷² Similarly, the League's recently extended broadcast contracts with CBS and Fox include provisions that the League will be paid by these networks even if no games are played because of a lockout.⁷³

The NFLPA is also building its own war chest. The NFL player representatives voted in September 2009 to authorize the NFLPA to divert all royalty payments from its marketing division, NFL Players, into a fund that the NFLPA hopes will amount to approximately \$60,000 per player in 2011.⁷⁴ Another component of those funds is attributable to increasing players' union dues from \$10,000 to \$15,000 in the 2009 and 2010 seasons.⁷⁵ The NFLPA has further suggested to its players to save twenty-five percent of their take home pay for their personal lockout fund.⁷⁶ Approximately one year ago, at the end of February 2009, the NFLPA's investments stood at nearly \$147 million, after a reported \$13.5 million loss in the NFLPA's fiscal year ending February 28, 2009.⁷⁷ A war of attrition heavily favors the NFL owners, but NFL Commissioner Roger Goodell has publicly refuted the union's belief that the owners are aiming for a lockout. "You [do not] make money by shutting

owner of MLB's Texas Rangers and the NHL's Dallas Stars and New York University Professor and expert in professional franchises (Mar. 6, 2010).

70. *Id.*

71. See Matthew Futterman, *NFL, DirecTV Extend Pact in \$4 Billion Deal*, WALL ST. J., Mar. 24, 2009, at B5.

72. *NFLPA Head Smith Believes Team Owners Preparing For Lockout*, NFL.COM, <http://www.nfl.com/news/story?id=09000d5d81634978&template=with-video-with-comments&confirm=true> (last visited Mar. 29, 2010) [hereinafter *NFLPA Head Smith Believes*].

73. Judy Battista, *TV Deal Bolsters League's Lockout Chest*, N.Y. TIMES, May 20, 2009, at B19. It has been reported that the Fox and CBS extensions averaged \$712 million and \$622 million, respectively per year, with these networks receiving credit towards future year's payment for payments made during a lockout. *Id.*

74. *NFLPA Votes to Start Fund for '11 In Case of Lockout or Strike*, SPORTSBUSINESSDAILY.COM, Sept. 14, 2009, <http://www.sportsbusinessdaily.com/article/133277>.

75. Jon Saraceno, *NFLPA Building Lockout War Chest by Increasing Player Dues by 50%*, USATODAY.COM, Sept. 22, 2009, <http://content.usatoday.com/communities/thehuddle/post/2009/09/nflpa-building-lockout-war-chest-by-increasing-player-dues-by-50/1>.

76. Mike Wilkening, *NFLPA's Smith: Lockout Looming in 2011*, PROFOOTBALLWEEKLY.COM, Feb. 4, 2010, <http://www.profootballweekly.com/2010/02/04/nflpas-smith-lockout-looming-in-2011>.

77. Daniel Kaplan, *NFLPA Paid Upshaw's Estate \$16M Out of Trust*, STREET & SMITH'S SPORTS BUS. J., Feb. 1, 2010, at 33.

down your business,” Goodell announced.⁷⁸

b. Short Careers

Playing careers in professional team sports are short. In fact, NFL players’ careers are the shortest among their counterparts in MLB, the NBA, and the NHL. Average Player Career Length:

Major League Baseball	5.6 years ⁷⁹
National Hockey League	5.5 years ⁸⁰
National Basketball Association	4.8 years ⁸¹
National Football League	3.5 years ⁸²

Short careers heighten the importance of avoiding or limiting a work stoppage, particularly from the players’ perspective.

c. Replacement Players Are Not a Viable Solution.

Professional athletes are some of the highest-skilled workers in the world. They possess natural physical abilities, honed by years of practice, which cannot be easily duplicated with mere hard work or good fortune. Owners of professional sports franchises, even when faced with the revenue losses that may accompany a strike or lockout, rarely consider using temporary or permanent replacements.

78. *NFLPA Head Smith Believes*, *supra* note 72. That axiom will undoubtedly serve as a constant reminder to management, as well as the players, of the benefits of cooperation irrespective of the funding behind their ostensibly irreconcilable convictions.

79. Sam Roberts, *Just How Long Does the Average Baseball Career Last?*, NYTIMES.COM, July 15, 2007, <http://www.nytimes.com/2007/07/15/sports/baseball/15careers.html>.

80. *NHL Career Length Distribution (Seasons) Between 1917-18 – 2003-04*, QUANTHOCKEY.COM, <http://www.quanthockey.com/Distributions/CareerLengthSeasons.php> (last visited Mar. 30, 2010).

81. Harriet Barovick et al., *Notebook: Jan. 18, 1999*, TIME.COM, <http://www.time.com/time/magazine/article/0,9171,990035,00.html>.

82. NFL Hopeful Frequently Asked *Questions*, NFLPA.COM, <http://www.nflplayers.com/About-us/FAQs/NFL-Hopeful-FAQs/> (last visited Mar. 30, 2010).

There is no evidence that the owners in the most recent NBA lockout ever seriously considered using replacements.⁸³ “During the Major League Baseball strike in 1994, some of the owners embarrassed themselves by toying with the idea of continuing the season using replacement players[,]”⁸⁴ and although replacement players were used for three games during the 1987 NFL strike, this tactic was largely unsuccessful.⁸⁵ Professional athletes operate in an essentially closed labor market, giving them a tremendous negotiating advantage over their unionized counterparts in other occupations.⁸⁶

2. Unionization of NFL Coaches Is Unlikely.

Unlike the players, coaches in the NFL are not part of a union.⁸⁷ In 1996, NFL coaches formed an association (Coaches Association), which allowed them to compile coaches’ salary data, creating a powerful bargaining tool for coaches during salary deliberations.⁸⁸ Larry Keenan, a former NFL assistant coach, is the head of the Coaches Association and functions as the single voice for his members.⁸⁹ However, because the coaches are not part of a union, they do not maintain a strike fund to ease the impact of a possible work stoppage. Yielding the question, at a time when a work stoppage is seemingly inevitable, could the NFL coaches create a union?

Due to their positions and duties within an NFL team, coaches may be legally unable to unionize. “Supervisors and managerial employees are excluded from the categories of employees entitled to the benefits of collective bargaining under the National Labor Relations Act.”⁹⁰ An employer found to be a supervisor cannot unionize other supervisors.⁹¹

[The National Labor Relations Act (NLRA)] requires the resolution of three questions; and each must be answered in the affirmative if an employee is to be deemed a supervisor. First, does the employee have authority to engage in 1 of the

83. Hayden, *supra* note 12, at 462.

84. See Steven Greenhouse, *Power Bargaining: Walking the Picket Line in Gucci Loafers*, N.Y. TIMES, Nov. 22, 1998, § 4, at 4.

85. Hayden, *supra* note 12 at 462.

86. *Id.*

87. Liz Mullen, *NFL Labor Fears Affect Deals for Execs, Coaches*, STREET & SMITH'S SPORTS BUS. J., Sept. 21, 2009, at 1.

88. NFL Coaches Association, *Coaches Use Salary Survey to Negotiate Contracts*, NFLCOACHES.COM, Sept. 22, 2008, <http://www.nflcoaches.com/>.

89. *Id.*

90. NLRB v. Yeshiva Univ., 444 U.S. 672, 674 (1980).

91. NLRB v. Health Care & Ret. Corp. 511 U.S. 571, 573-74 (1994).

12 listed activities [in 29 U.S.C. § 152(11)]? Second, does the exercise of that authority require “the use of independent judgment”? Third, does the employee hold the authority “in the interest of the employer”?⁹²

It is necessary for coaches to examine whether they satisfy the three requirements outlined by the NLRB. While head coaches have been deemed in the past to be supervisory in nature, therefore making it impossible for them to collectively bargain, assistant coaches fall into more of a gray area.⁹³ Assistant coaches engage in fewer of the activities outlined in 29 U.S.C. § 152(11) than head coaches.⁹⁴ Assistant coaches’ input matters in many decisions concerning suspension, recall, discharge, assignment, reward, and discipline, but unlike the head coach, they do not have the final say.⁹⁵ The second requirement—use of independent judgment—is a little less clear. Offensive and defensive coordinators may determine the players and formations for particular plays, but the head coach ultimately still retains oversight. The third requirement, “in the interest of the employer,” is even less clear than the second. Assistant coaches could argue that they are working in the interest of the players and themselves. However, the court, like in *NLRB v. Health Care & Retirement Corp.*, could rule that the interest of the disputed supervisors was also the interest of the employer, therefore nullifying their union.⁹⁶

Regardless, with a potential work stoppage in sight, and the NFL now allowing teams to opt out of their pension plans, assistant coaches might benefit from trying to form a union.⁹⁷ Nine teams have already opted out of the NFL’s pension plan: Dallas, New England, Atlanta, Jacksonville, New Orleans, Buffalo, Arizona, and San Francisco.⁹⁸ The ambiguity of whether assistant coaches can unionize and the status of their pension plans with teams

92. *Id.*; see also 29 U.S.C. § 152(11) (2010).

93. See generally Robert H. Lattinville & Robert A. Boland, *Coaching in the National Football League: A Market Survey and Legal Review*, 17 MARQ. SPORTS L. REV. 109 (2006).

94. See *id.* at 113-14.

95. *Id.*

96. *Health Care & Ret. Corp.*, 511 U.S. at 576-81.

97. Judy Battista, *Teams Leaving NFL’s Pension Plan, Angering Assistants*, N.Y. TIMES, May 13, 2009, at B16.

98. John McClain, *Texans to Keep Gibbs Despite Dispute: 9 NFL Teams Anger assistants by Opting Out of Pension Plan*, HOUSTON CHRON., May 8, 2009, at 8. In the past, coaches could qualify for pension by serving fifteen years in the NFL. *Id.* When a coach turned sixty-five the pension plan could be taken. *Id.* The NFL’s decision to allow teams to opt out and form their own pension plans is the product of a recessive economy, with teams believing they can cut cost by creating their own pension plan. *Id.*

may cause assistant coaches to attempt to unionize. Unionization could guarantee their future benefits and provide protection in the event of a work stoppage.

Unionization might be an effective alternative as a common benefits and retirement plan manager for NFL Coaches. However, few employers are truly ever happy about extending collective bargaining benefits to more employees, as union members. In professional sports, unions often provide antitrust immunity in exchange for the influence achieved through collective bargaining.⁹⁹ It is not clear, short of teams wanting to impose a strict wage scale on coaches via collective bargaining, what the NFL would gain by not vigorously pursuing the disqualification of coaches as supervisory or managerial personnel before the NLRB, if there was an attempt at unionization.¹⁰⁰ Similarly, prevailing wages in the coaching market are set from the top down, with high profile coaches such as the newly hired Mike Shanahan in Washington, D.C., and Pete Carroll in Seattle, Washington, along with Super Bowl Champions like Bill Belichick, currently commanding the top salaries.¹⁰¹ In turn, compensation for head coaches impacts the salaries offensive and defensive coordinators can demand and expect to receive, since sometimes coordinator salaries are used to influence a coordinator from pursuing head coaching opportunities.¹⁰² So, even if a certain strata of NFL coaches might qualify to form a union, the practical impact of such a union—beyond being a benefits provider—might be negligible at best. Moreover if NFL owners were provided antitrust protection via collective bargaining to impose a wage scale or salary cap on coaching salaries, unionization might have a negative impact on the coaching market.

99. See MATTHEW J. MITTEN ET AL., *SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS* 437-39 (2d ed. 2009).

100. Lattinville & Boland, *supra* note 93, at 114.

101. *Id.* at 114-15. (quoting NFL commentator Pat Kirwan, who suggested that unionization might be disadvantageous, causing coaches to lose much of the salary leverage they now enjoy); see also Tom Van Riper, *The Highest Paid Coaches; Despite the Recession, Life is Good for Many Head Coaches – Especially in the NBA*, FORBES.COM, May 14, 2009, <http://www.forbes.com/2009/05/13/highest-paid-coaches-business-sports-nba.html>.

102. See *Cowboys Make Garrett Highest-Paid Assistant in NFL*, ESPN.COM, Jan. 17, 2008, <http://sports.espn.go.com/nfl/news/story?id=3200822>. The story reports on the Dallas Cowboys raising offensive coordinator Jason Garrett's salary to \$3 million annually, to retain him as an assistant, when it appeared likely that Garrett would accept the head coaching position in either Atlanta or Baltimore. *Id.*

3. A Note Regarding the American Needle Case and Current Collective Bargaining Precedent.

During the 1960s, the NFL set up NFL Properties as a marketing entity to promote the professional football brand.¹⁰³ Licensees would obtain licenses to reproduce the NFL's marks on various forms of apparel.¹⁰⁴ The NFL saturated the market by allowing many different vendors to produce caps featuring their symbols; one of these vendors was American Needle.¹⁰⁵ In 2000, after American Needle had produced NFL caps for twenty years, the NFL decided to discontinue any other licensing agreements for caps except with Reebok.¹⁰⁶ American Needle later sued Reebok, the NFL, NFL Properties, and all of the clubs, claiming a violation of the Sherman Antitrust Act.¹⁰⁷

The timing of *American Needle v. National Football League* could challenge the NFLPA and its negotiations with the NFL over a new CBA. *American Needle* will determine if the NFL is a single entity, as it alleges, or thirty-two independent franchises that must collude to provide their football product.¹⁰⁸ Currently, every sports league consists of independent franchises that need an antitrust exemption to conduct everyday activities such as game scheduling, size of rosters, and minimum pay.¹⁰⁹ If the NFL did not have the labor exemption, the majority of their actions would be a violation of Section 1 of the Sherman Antitrust Act: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."¹¹⁰ The medium through which the NFL derives much of its immunity from antitrust is its CBA.¹¹¹ The NFLPA provides that immunity through its role in the CBA; without the CBA the NFL could not exist.¹¹²

103. Lyle Denniston, *Pro Sports and Antitrust: Argument Preview*, SCOTUSBLOG.COM, Jan. 12, 2010, <http://www.scotusblog.com/2010/01/pro-sports-and-antitrust-argument-preview/>.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. Robert Boland, *Oral Arguments Begin in American Needle vs. NFL*, NATIONALFOOTBALLPOST.COM, Jan. 13, 2010, <http://www.nationalfootballpost.com/Oral-arguments-begin-in-American-Needle-vs-NFL.html>.

109. *Id.*

110. Sherman Antitrust Act, 15 U.S.C. § 1 (2006).

111. Boland, *supra* note 108.

112. *Id.*

In the district court and in the Seventh Circuit Court of Appeals, American Needle lost.¹¹³ Both courts found that the NFL is a single entity and therefore, cannot violate the Sherman Act.¹¹⁴ The Supreme Court heard oral arguments on January 13, 2010, and could come back with a decision which determines where the NFL is a single entity and where it is not.¹¹⁵ If the Supreme Court renders a vague or broad decision in favor of the NFL, the position of the NFL could be strengthened and that of the NFLPA diminished, creating an uphill battle for the NFLPA in its negotiations with the League.¹¹⁶ A decision that lessens the importance of the need for collective bargaining or the union's ability to decertify and use antitrust as a weapon has potential to hurt the NFLPA's position.¹¹⁷ The NFL has very little to lose as it was victorious at the summary judgment stage, and even if the Supreme Court were to decide strongly against them, the worst possible outcome would likely be for American Needle's claims to be remanded for trial on the merits.¹¹⁸

The chief impact a decision favorable to the NFL in the *American Needle* case would have on coaches, players, and a potential lockout relates to whether the NFLPA would maintain its ability to decertify as a union and aid players in pursuing claims in antitrust as it did in the 1990s with *McNeil v. National Football League*.¹¹⁹ It is interesting to note that the NFL unsuccessfully argued that they were a single entity in the *McNeil* case, and that argument was rejected by the District Court in *McNeil*.¹²⁰ It is the Seventh Circuit Court of Appeals' decision in *American Needle* that has once again emboldened the league to test its single entity arguments.¹²¹

Prior to the 2006 CBA, which has been hailed as a great victory for the union, the NFLPA as a union had only a modest history of success in collective bargaining. But by decertifying and assisting players in pursuing antitrust claims, the NFLPA gained perhaps its greatest traction against the NFL.¹²² Judge David Doty of the Federal District Court of Minnesota still maintains oversight of labor issues in football due both to the outcome of the

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Am. Needle, Inc. v. Nat'l Football League*, 538 F.3d 736 (7th Cir. 2008), *cert. granted*, 129 S. Ct. 2859 (U.S. June 29, 2009).

119. *McNeil v. Nat'l Football League*, 790 F. Supp. 871 (D. Minn. 1992).

120. *Id.* at 878-80.

121. *Am. Needle*, 538 F.3d at 740, 744.

122. See Sean W.L. Alford, *Dusting Off the AK-47: An Examination of NFL Players' Most Powerful Weapon in an Antitrust Lawsuit Against the NFL*, 88 N.C. L. REV. 212, 212-17 (2009).

McNeil case and a consent decree from *White v. National Football League*.¹²³ The NFL recently moved to have Doty's oversight of its labor relations with its players union arising from that consent decree entered in 1993 in the *White* case terminated, but that action was unsuccessful.¹²⁴

If the Supreme Court were to recognize a broad application of the single entity theory, the position the NFL is arguing for before the Court in *American Needle*, the NFLPA's leverage both in collective bargaining and as the decertified organizer of antitrust actions like *McNeil* would be radically diminished.¹²⁵ In the event of a broad NFL victory in *American Needle*, there would likely not be a lockout, as the NFLPA would have little leverage except to accept the NFL's CBA offer. The impact upon coaches might be equally dire, especially if ownership sought to level the inequities in coaching compensation with a wage scale or team salary cap for coaches, which might be permissible if the Court gave credence to the NFL's argument of complete internal antitrust immunity. Given the low spending on coaches as compared to player salaries, coaching compensation has been a place where high revenue owners can gain an advantage over lower revenue teams, so it remains to be seen whether the owners would be willing to agree to such broad limitations.¹²⁶

Similarly, if the Supreme Court issues either a narrowly tailored decision favoring the NFL in the *American Needle* case, or finds in favor of American Needle's claims, the journey toward a lockout or work stoppage would proceed unabated. If the NFLPA were to successfully decertify, as they did in the *McNeil* case, and as provided for in the expiring CBA, there would be some question as to whether a lockout would remain a viable option since a range of labor law options, perhaps including the ability to lockout, would or might not apply in the case of decertification.¹²⁷ But this would likely not take place without significant legal wrangling, and there would seem to be a reasonable question as to whether the remedy of a lockout could survive the termination of a collective bargaining relationship.¹²⁸

Another possibility, especially in the absence of changed precedent from a

123. *White v. Nat'l Football League*, 585 F.3d 1129, 1136-38 (8th Cir. 2009).

124. *Id.* at 1138.

125. See Boland *supra* note 108.

126. See Lattinville & Boland, *supra* note 93, at 125 (quoting former NFL executive and commentator Pat Kirwan saying that "if the owner really wants to make a difference, the one place he can do it is by spending more money on his coaching staff"). Kirwan's comments come during a time when a salary cap was in place but remain relevant when one considers how much influence coaches have and how small their combined salaries are compared to player salaries.

127. See Alford, *supra* note 122, at 246-47.

128. *Id.*

decision in *American Needle*, and one far less dire for coaches, is that the league simply bargains to impasse with the NFLPA this year and uses the impasse to impose work rules on its players.¹²⁹ There would be no work stoppage and the dispute between the league and its players could continue in court for years to come. This would parallel the relationship between the League and players in the early 1990s, which was legally contentious and culminated in the players' victory in *McNeil*.¹³⁰ In this environment, the existing relationship between coaches and their teams would not likely change with their respective teams. But the continuing specter of a work stoppage would also likely keep a variety of unfavorable work stoppage clauses in coaching contracts throughout the period; such language is discussed in greater detail in Part IV.

III. A WORK STOPPAGE: FACTS AND ASSUMPTIONS

A. *Timing of a Lockout*

One of the critical elements as to the preparedness of NFL coaches for any potential lockout is when such a lockout might occur. The approach the NBA took in 1994, led by Commissioner David Stern, himself a former labor attorney at the firm of Proskauer Rose, has served as the model for other leagues seeking to conduct an offensive lockout.¹³¹ Stern's and the NBA's lockout strategy was aided by success in two proceedings.¹³² The first victory took place in relation to an NLRB grievance which was filed by the players union and subsequently withdrawn without any of its claims for relief having been granted; including a claim for an injunction alleging that an off-season lockout was illegal because the players were not working at the time.¹³³ The second was a victory in a grievance that found that the existence of guaranteed contracts did not require players to be paid during a lockout.¹³⁴ The NHL followed a similar path during its lockout, which cost the NHL an entire season in 2004-05.¹³⁵ It is hardly a coincidence that the NFL has engaged

129. See Michael J. Cramer & James M. Swiatko, *Did Major League Baseball Balk? Why Didn't MLB Bargain to Impasse and Impose Stricter Drug Testing Standards for Performance Enhancing Substances?*, 17 MARQ. SPORTS L. REV. 29 at 48-49 (2006) (discussing the history of the imposition of impasse rules in professional sports).

130. See generally *McNeil v. Nat'l Football League*, 790 F. Supp. 871 (D. Minn. 1992).

131. See Hayden, *supra* note 12, at 455.

132. *Id.* at 456-57.

133. *Id.*

134. *Id.* at 456-57.

135. Staudohar, *supra* note 54, at 23.

current Proskauer partner Bob Batterman as labor counsel. Mr. Batterman is regarded by many as the co-architect of the offensive lockout strategy along with his former Proskauer colleague, Mr. Stern.¹³⁶

But there are some critical practical differences between those offensive lockouts and a potential NFL lockout, and the most striking difference is that the NFL League Year ends and the expiration of its CBA comes fairly close after the conclusion of the 2011 NFL season.¹³⁷ The NFL players should still be in reasonably good financial shape from the regular season, when players are commonly paid the bulk of their contract compensation in weekly checks. The expiration of the NBA League Year in 1994, prior to its lock out, took place in June—almost three months after the end of the regular season.¹³⁸ When the grievance filed by the union on behalf of over two hundred players seeking to be paid their guaranteed salaries, despite the lockout, was denied, the NBA players were several months removed from any compensation and agreeing to a CBA favorable to ownership became the only realistic prospect for the players of getting paid.¹³⁹ If an NFL lockout were to begin as early as March 1, 2012, at the expiration of the CBA, it could provide some small advantage to the players. The NFL players would in most cases be only a month removed from their last game check and would have more than a full year's warning that a lockout might take place.

Additionally, NFL compensation is paid rather differently than NHL or NBA compensation, which largely consists of guaranteed contracts paid during the playing year.¹⁴⁰ More veteran NFL players and highly drafted players are often compensated through a variety of bonuses, which pay at more irregular intervals around the calendar year.¹⁴¹ These bonuses take the place of guaranteed contracts in the sport. Former Oakland Raiders executive Michael Lombardi said that most of his players who had bonuses had roster bonuses that paid out on the fifth day of the League Year.¹⁴² This fact would

136. Baxter, *supra* note 57.

137. NAT'L FOOTBALL LEAGUE, *supra* note 1, at art. I, § 1(g).

138. *NBA Labor History*, CHI. SUN-TIMES, Aug. 8, 1995, at 94.

139. Hayden, *supra* note 12, at 456-57 *cf.* Mike Wise, *Pro Basketball: When Millionaires are Laid Off*, N.Y. TIMES.COM, Oct. 26, 1998, <http://www.nytimes.com/1998/10/26/sports/pro-basketball-when-millionaires-are-laid-off.html?pagewanted=1> (detailing the famous profligate spending and expenses of NBA player Kenny Anderson, who was experiencing a cash shortage in October after not being paid his full salary of \$5.8 million dollars because of the lockout).

140. See Ed Bouchette, *NFL: There's No Guarantees, Except Contract Money*, PITTSBURGHPOST-GAZETTE.COM, Mar. 31, 2002, <http://www.post-gazette.com/sports/notebooks/20020331nfnnot3.asp>.

141. *See id.*

142. Interview with Michael Lombardi, former Oakland Raider executive (Feb. 11, 2010).

seem to favor the lockout beginning in March as the teams would have the ability to avoid paying lucrative roster bonuses during the lockout.

However, it is also common for NFL players to have bonuses tied to participation in the team's off-season training program. Former Green Bay Packers vice president and current University of Pennsylvania lecturer, Andrew Brandt, said such workout bonuses were common and usually predicated on the completion of eighty-five percent of the team's off-season conditioning sessions.¹⁴³ One last key piece of data to consider in ascertaining the likely timing of a lockout is that the last activity contemplated by the expiring CBA is the 2011 player draft, an event that in recent history takes place in late April.¹⁴⁴ With the draft going forward under the CBA and serving as a major television and promotional event for the league,¹⁴⁵ it is doubtful that even in the face of a looming work stoppage that the NFL would not take advantage of this publicity and potential revenue. With conditioning bonuses pending too, there are multiple reasons to believe that a lockout might not occur until as late as May or June. Locking out in this time frame would preserve the draft as a major off-season event and allow the owners to avoid having to pay workout bonuses or perhaps draft picks, while still retaining the rights to their players.

The foregoing facts may shed some light as to the timing of a potential lockout. In an offensive lockout, which is at least what the NFL seems to be convincing the players that it intends to do, it is practically advantageous to do so at a time when the players are at their collective financially poorest moment.¹⁴⁶ This would indicate that there might not be an immediate lockout at the end of the League Year, as the players are not far removed from their last paycheck in January when the League Year expires in early March. The fact that the NFL Draft is both a key League activity as well as a revenue and attention producer for the League, it is unlikely that a lockout would take place prior to the 2011 draft, which is traditionally held at the end of April.

NFL owners could even open training camps in July 2011, only to lock players out on the eve of the regular season, when players begin receiving weekly game salaries. This kind of a late lockout would shift the burden of the strike-lockout paradigm back to the NFLPA, which might have to decide

143. Interview with Andrew Brandt, former Green Bay Packers Vice President and current University of Pennsylvania lecturer (Feb. 11, 2010).

144. NAT'L FOOTBALL LEAGUE, *supra* note 1, at art. XVI, § 1.

145. See Bill Gorman, *NFL Draft Viewership Up 62% Over 6 Years*, TVBYTHENUMBERS.COM, Apr. 24, 2009, <http://tvbythenumbers.com/2009/04/24/nfl-draft-viewership-up-62-over-6-years/1735>

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146. See Hayden, *supra* note 12, at 455.

to declare a strike themselves or report to training camp with the specter of a lockout looming. But a late lockout would also mean that a variety of bonuses, including rookie-signing bonuses, would have been paid by owners to players. Therefore it is most likely that any lockout would occur, if one were to occur, sometime after the college draft and before rookie signings or veteran workout bonuses were due to be paid, saving clubs the largest amount of money. This information points toward late May or early June as the most likely date for a lockout, as the players would be reasonably far removed from their last game checks, the draft would be preserved as an event, and the clubs could use the lockout to avoid paying a substantial amount of bonus money. With work stoppage language, calling for immediate pay cuts and potential termination if a work stoppage lasts for specified periods, now appearing in coaching contracts,¹⁴⁷ it is critical that coaches not be caught unprepared by a surprise lockout of players. While a lockout could certainly begin as early as the beginning of March 2011—the conclusion of the 2010 League Year and expiration of the CBA—a later lockout seems more likely. And even if the players are locked out in early March of 2011, there will be no shortage of work for NFL coaches.

B. NFL Coaches' Off-Season Duties

At the conclusion of their club's playing season, NFL coaches enjoy little free time before undertaking off-season, off-field duties that last well into the start of the new League Year. The NFL's 2010 regular season will conclude on Sunday, January 2, 2011, and culminates with Super Bowl XLV on February 7, 2011.¹⁴⁸ Twelve of thirty-two NFL teams qualify for the playoffs.¹⁴⁹ So, the coaching staffs of a dozen NFL clubs will remain focused on their in-season duties well into January, while the off-season for twenty NFL staffs begins on January 3, 2011. Whether an NFL coaching staff is involved in the play-offs or not, almost all NFL coaches will be traveling to Mobile, Alabama in January to attend several days of Senior Bowl practices.¹⁵⁰ Since the Senior Bowl is traditionally played in late January,

147. Mullen, *supra* note 87, at 1.

148. *NFL Postseason Schedule 2009*, NFL.COM, <http://www.nfl.com/schedules> (last visited Apr. 1, 2010).

149. *See id.*

150. Jason Reid, *Redskins Coaches Head for Senior Bowl with NFL Draft in Mind*, WASHINGTONPOST.COM, Jan. 24, 2010, <http://voices.washingtonpost.com/redskinsinsider/jason-reid/redskins-coaches-head-for-seni.html>. The parent organization of the Senior Bowl approved a three-year lease that will keep the Senior Bowl game at Ladd Peebles Stadium in Mobile, Alabama, through 2012. *Senior Bowl to Remain in Mobile*, SENIORBOWL.COM, Oct. 8, 2009, <http://seniorbowl.com/article.asp?articleID=166>. Notably, however, the lease provides for an option to cancel the

every NFL club but the Super Bowl participants will be focused primarily on off-season duties within a few weeks or less of their final game.¹⁵¹ Although the specific responsibilities of a given coach vary from club to club, there are numerous off-season duties undertaken by an NFL coaching staff that are uniform among clubs, notwithstanding nominal differences in their descriptions from one club to another.

The makeup of an NFL coaching staff is frequently dynamic as coaches change positions at the end of the season. In 2008, for example, forty-two percent of NFL coaches changed jobs.¹⁵² Depending upon the position to be filled, many NFL coaches are interviewing other coaches or being interviewed by NFL front offices and their current coaching staffs throughout January and the early part of February. Those staffs with little turnover in a given year may enjoy the advantage of tackling their off-season responsibilities sooner and as a group.

NFL coaches are involved in two primary off-season functions that do not involve direct interaction, on the field or off the field, with the club's current players: (1) self-scouting or internal performance evaluations of the coach's current pro team's personnel; and (2) prospect scouting. Prospect scouting includes a coach's analysis of draft eligible prospects as well as free agent prospects, including the club's own free agent prospects. Coaches frequently dedicate their office time in the mornings to self-scouting activities and then join members of the scouting department and front office in the afternoons and evenings to evaluate personnel matters.

The self-scouting process lasts several months or more and includes each coach's evaluation of the club's scheme, personnel, and decision making on the other side of the ball from the position(s) he coaches. This analysis often requires film study of at least half of the club's games from the immediately prior season. Of course, the defensive coaches, for example, also evaluate their own performance. Moreover, in conjunction with the offensive coaches' intra-staff evaluation, each coach, each offensive and defensive staff member, and the staff as a whole prepares a report that identifies and prioritizes the team's on-field strengths, weaknesses, and remedial measures.

Self-scouting is somewhat of a misnomer in the sense that almost every coach on an NFL staff is also assigned to identify and study the top categorical performances across the League, and assess the reasons for such success. For

agreement after each year. *Id.*

151. See *NFL Postseason Schedule 2009*, *supra* note 148.

152. John Crumpacker, *NFL Assistant Coaches Have Pension Concerns*, SFGATE.COM, May 13, 2009, http://articles.sfgate.com/2009-05-13/sports/17202178_1_pension-plans-defined-benefitpension-nfl-owners.

example, a linebacker coach may be asked to review the NFL's top five short yardage and two minute defenses in terms of yards and points allowed. Such an analysis necessarily requires reviewing thousands of snaps on film and preparing both written and oral reports to the staff as a whole identifying, among many conclusions, (1) the relative effectiveness of a given scheme; (2) the importance of personnel and their relative skills in such schemes; (3) the stunts, calls, or adjustments best suited to defend the most likely offensive schemes, personnel, and calls in that category; and (4) the coach's proposal for improving the club's performance in the category to which the coach was assigned. Once the background analysis is completed and the reports are vetted among the staff, the position coach will be responsible for revising the club's playbook for that category consistent with the staff's recommendations.

Prospect scouting is equally detail oriented and labor and time intensive. Most position coaches are assigned to at least evaluate all of the players at his position that will be attending the Senior Bowl. Generally, the club will compile a "point of attack" or skills overview video that the coach will be responsible for reviewing prior to attending Senior Bowl practices. From these films, the coach responsible for the evaluation will prepare a preliminary evaluation as well as a list of interview questions to be presented to the prospect. This group of prospect evaluations will likely expand by ten or more for the NFL Combine, which takes place in late February.¹⁵³ After the NFL Combine, NFL coaches will engage in more in-depth film review of prospects at their position and attend on-campus workouts of preferred prospects during March and April leading up to the NFL Draft.

Concurrent with the evaluation of draft eligible players, NFL coaching staffs evaluate the club's current players at the coaches' positions whether the players are scheduled to be free agents or not. Hours of film are reviewed again and the coach typically provides a written and oral evaluation of his players' performance and potential to the coaching staff as a whole, the scouting department, and the front office. Once these internal evaluations are completed, coaches are charged with evaluating the League's upcoming free agents at the positions they coach. Evaluations for the most productive and potentially sought after free agents begin first. These free agent evaluations may continue up to the NFL Draft and thereafter depending upon the club's perceived roster needs. In 2010, there will be a somewhat limited free agent market as the thresholds for qualifying for free agency has been increased as part of the uncapped League Year.¹⁵⁴ Some two hundred players who had

153. See *NFL Scouting Combine Information*, NFL.COM, <http://www.nfl.com/combine> (last visited Apr. 1, 2010).

154. Andrew Brandt, *A Precarious State for NFL Players*, NATIONALFOOTBALLPOST.COM, Jan.

expected to reach unrestricted free agency after completion of their fourth year of credited service now will be restricted free agents, with their rights tied to their former club because of a provision in the expiring CBA, which raised the threshold for free agency from four to six years in the uncapped year.¹⁵⁵ League Year 2011, however, has the potential to include a large free agent class if a new CBA provides for free agency consistent with the pre-2010 League Year requirements.¹⁵⁶

Following the NFL Draft, an NFL coaching staff's direct interaction with the club's players increases. The coaches script and execute practice schedules for mini-camps and off-season training activities (i.e., un-padded skill intensive sessions). Film study with players and off-field coaching sessions complement the coaches' on-field efforts. These post-draft activities continue into June.¹⁵⁷ Since most clubs begin training camp on or about fifteen days prior to the first pre-season game, NFL coaches enjoy a few weeks off in late June and early July.¹⁵⁸ With the important exception of the club's strength coaches, most of the coaching staff's off-season duties do not include direct interaction with the club's players until May, thus there is no shortage of critical and time intensive off-season duties for NFL coaches that extend well into the new League Year.

Based on the foregoing, depending on the timing of a potential lockout situation, coaches would still have important evaluative work to complete. The franchise that used its intellectual and evaluative assets effectively might gain a decided advantage over teams that either cut the compensation of or outright terminate its coaches in the event of a work stoppage. This runs counter-intuitive to former Packer executive Andrew Brandt's report that, "[t]eams are at least preparing as if there will be no football in 2011, with adjustments to assistant coaches' contracts in 2011 that call for pay reductions of anywhere from 25 to 50 percent and even rights to terminate in the event of a lockout with 30-60 days notice."¹⁵⁹

4, 2010, <http://www.nationalfootballpost.com/A-precarious-state-for-NFL-players.html>.

155. *Id.*

156. NFL CBA Restricted Free Agency is available to players with three or more Accrued Seasons. NAT'L FOOTBALL LEAGUE, *supra* note 1, at art. XIX § 2(a). Unrestricted Free Agency is available to players with four or more Accrued Seasons. *Id.* § 1(a). An Accrued Season is earned for each League Year during which the player is on the club's fifty-three-man roster for six or more regular season games. *Id.* at art. 1, § 2(n).

157. See Lori Nickel, *Running Into Time Constraints; School First, NFL Second for Sutton*, JSONLINE.COM, May 4, 2009, <http://www.jsonline.com/sports/packers/44334072.html>.

158. See *2009 NFL Training Camp Reporting Dates*, NFL.COM, <http://www.nfl.com/trainingcamp/story?id=09000d5d81102c35&template=without-video-with-comments&confirm=true> (last visited Apr. 1, 2010).

159. Andrew Brandt, *Frustration Continues on NFL Labor Front*, NATIONALFOOTBALLPOST.

C. Alternative Football Employment Limited

Unfortunately for NFL coaches, a work stoppage will likely begin at a time when few other jobs will be available in the football business. Most college and professional coaching positions become available and are filled in a two to three month window beginning in December.¹⁶⁰ Similarly, the availability of most broadcast or color analyst positions will be scarce if the NFL is not playing games; the coverage of the sport will dramatically decrease. Generally, the market for coach-related skills will likely provide relatively low wages, as the market needs will be low and the supply of workers high.

The most obvious substitute employers, colleges and universities that are football-playing members of the National Collegiate Athletic Association (NCAA), are not a realistic option for most coaches. The NCAA limits the number of coaches on a college staff.¹⁶¹ In the Football Bowl Subdivision of the NCAA (commonly known as Division I), a university may employ one head coach, nine assistant coaches, and two graduate assistants.¹⁶² NCAA members in the Football Championship Subdivision (formerly known as Division IAA) are limited to eleven total coaches.¹⁶³ In addition to these limitations, NCAA Bylaws dramatically limit permissible consulting activities available to a coach outside the designated staff.

11.7.1.1.1.4 Use of Outside Consultants. An institution may use or arrange for a temporary consultant to provide in-service training for the coaching staff, but no interaction with student-athletes is permitted unless the individual is counted against the applicable coaching limits. An outside consultant may not be involved in any on- or off-field or on- or off-court coaching activities (e.g., attending practices and meetings involving coaching activities, formulating game plans, analyzing video involving the institution's or opponent's team) without counting the consultant in the coaching limitations in that

COM, Feb. 3, 2010, <http://www.nationalfootballpost.com/Frustration-continues-on-NFL-labor-front.html>.

160. There may be a limited number of professional coaching positions available in the spring and early summer in the Canadian Football League, the United Football League, and the Arena Football League.

161. NAT'L COLLEGIATE ATHLETIC ASS'N, OPERATING BYLAW art. 11.7, *reprinted in* 2009-10 NCAA DIVISION I MANUAL 53-60 (2009) [hereinafter NCAA MANUAL].

162. *Id.* at 54.

163. *Id.* at 55.

sport. (*Adopted: 1/10/92, Revised: 3/10/04*)¹⁶⁴

Substitute employment for NFL coaches in any industry is likely to be limited. Even potentially lucrative player development consulting opportunities, i.e. athlete training, would be limited with the possibility of NFL employment for these college players in limbo. Understandably, the most sought-after employers will be skittish about hiring any employee that is likely to return to their previous profession at any time.

IV. CONTRACT CONSIDERATIONS

A. Prevailing Terms

NFL assistant coaches' contracts typically provide for a term of two or three years. Thus, many NFL assistant coaches are currently or will soon be negotiating the work stoppage provisions in their new contracts.¹⁶⁵ The contract treatment of coaches in the event of a work stoppage runs a wide gamut. Such treatment includes coach-friendly contracts that are either silent regarding a work stoppage or impose no penalty in conjunction therewith, as reportedly provided to the coaching staffs of the Baltimore Ravens and Cincinnati Bengals.¹⁶⁶ At the other end of the spectrum is at least one club, the San Francisco 49ers, which has attempted to impose termination rights immediately upon the start of a work stoppage.¹⁶⁷ Presumably, such termination would be without pay or any continued obligation or consideration, akin to a termination for cause.

NFLCA Executive Director Larry Kennan reports several other examples of NFL assistant coaches' contracts addressing the effect of a work stoppage on the coaches' compensation, continued employment, or both: (1) the Denver Broncos's contracts guarantee its coaches fifty percent of their base salary;¹⁶⁸ (2) Tampa Bay Buccaneers's contracts provide for a twenty-five percent base pay reduction immediately upon the occurrence of the work stoppage, which may increase to a fifty percent reduction after ninety days.¹⁶⁹ After a work stoppage lasting ninety days or more, the Buccaneers's assistant coaches may be terminated;¹⁷⁰ (3) the Arizona Cardinals provide their coaches four full

164. *Id.* at 54.

165. Interview with Larry Kennan, NFLCA Executive Director (Feb. 9, 2010).

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

weeks of pay, thereafter the contracts impose a thirty-five percent base pay reduction for the duration of the work stoppage;¹⁷¹ (4) the Minnesota Vikings's assistant coaches' contracts provide a grace period of full compensation for the first ninety days of the work stoppage.¹⁷² For the next ninety days, the Vikings' coaches' compensation may be reduced by seventy-five percent, and at the end of 180 days, these coaches may be terminated;¹⁷³ (5) the Chicago Bears assistant coaches' contracts provide for the reduction of base salary by twenty-five percent coupled with the right to terminate upon sixty days notice;¹⁷⁴ and (6) the New York Jets can impose a twenty-five percent base salary reduction immediately in the event of a lockout.¹⁷⁵ If the lockout reaches ninety days in duration, the club has the option to reduce a coach's base compensation by fifty percent or terminate him;¹⁷⁶ and (7) the New York Giants guarantee their assistant coaches six months of base salary.¹⁷⁷

A more detailed examination of these work stoppage provisions reveals their reach and substance. For example, one recently executed assistant coach contract reviewed defines a work stoppage to include player strikes, management lockouts, and traditional force majeure events such as acts of God, war, and terrorist attacks.¹⁷⁸ This definition is expanded, however, by a clause that further defines a work stoppage to include any cause beyond the reasonable control of the club that results in the cessation of the club's normal football activities, as determined by ownership, in its sole discretion.¹⁷⁹ At the time of a work stoppage, the club may reduce the coach's salary immediately by up to fifty percent.¹⁸⁰ When the work stoppage concludes and normal football activities resume, as determined by the club, the coach's salary is immediately returned to the nominal contract rate.¹⁸¹

The length of a work stoppage portends further consequences pursuant to this work stoppage provision. If the work stoppage causes the cancellation of eight or more regular season games, the club maintains the option to extend

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. ASSISTANT COACH'S CONTRACT (Feb. 2010) (on file with author).

179. *Id.*

180. *Id.*

181. *Id.*

the contract for another contract year at the same salary as the last year of the contract.¹⁸² Finally, if the work stoppage continues for a period of more than six months, the club has the option to terminate the contract.¹⁸³ So, although this provision does not require any changes to the coach's contract upon a work stoppage, it has the potential to limit the contract's minimum benefits to six months of employment at half salary.¹⁸⁴ Conspicuously present in this contract's provisions is the treatment of a work stoppage termination the same as a for cause termination; the club will pay the coach through the date of the Notice of Termination and maintain no further financial obligations thereafter.¹⁸⁵

The absence of tolling provisions in these contracts is striking. Rather than tolling the remaining years of a given coach's contract in the event of a work stoppage, these provisions give the franchise the right to merely terminate a coach.¹⁸⁶ Since if a lockout were to occur it would be within the sole control of the NFL owners, a question may arise as to whether these kinds of clauses might be invalid as lacking mutuality or as contracts of adhesion under varying state law.

B. Negotiation Considerations

In anticipation of a work stoppage, NFL coaches—primarily assistant coaches that are much more likely to have to address this issue—would be wise to immediately recognize the economics of their relative costs and benefits and negotiate for, or better understand and account for, their contract's termination provisions and rights to supplemental income opportunities.

1. Cost/Benefit Analysis.

The World Champion New Orleans Saints and their Super Bowl opponent, the Indianapolis Colts,¹⁸⁷ represent, in terms of number, fairly typical NFL coaching staffs. Including Head Coach Sean Payton and the Saints two strength coaches, the Saints maintain a staff of twenty-one coaches.¹⁸⁸

182. *Id.*

183. *Id.*

184. *See id.*

185. *Id.*

186. *See id.*

187. *Super Bowl XLIV Information*, NFL.COM, <http://www.nfl.com/superbowl/44> (last visited Apr. 1, 2010).

188. *New Orleans Saints Coaching Roster*, NEWORLEANS SAINTS.COM, <http://www.neworleans saints.com/Team/Coaches.aspx> (last visited Feb. 27, 2010).

Including Head Coach Jim Caldwell and two strength coaches, the Colts maintain a staff of nineteen.¹⁸⁹ Presently, the average annual base compensation for an NFL assistant coach is \$350,000.¹⁹⁰ Most NFL head coaches are not required to accept work stoppage provisions that may reduce their compensation.¹⁹¹ Therefore, a fair estimate of the average total annual salary savings provided by terminating an entire NFL staff of assistant coaches is less than \$7 million (nineteen assistant coaches x \$350,000 annual salary = \$6,650,000).¹⁹² This salary savings equates to approximately five percent of the NFL's adjusted 2009 per club salary cap of \$128 million.¹⁹³ Since it is highly likely that the duration of any work stoppage would continue for much less than a full year, if at all, a better estimate of the per club cost of paying assistant coaches their full salaries during a lockout is approximately \$1-2 million. This is a relatively small price to pay to secure the performance and morale of the club's coaching staff, the first and primary contact for players returning to the club. The reduction in NFL player benefits costs in the 2010 uncapped year alone, reportedly about \$10 million, would likely cover each club's coaches' payroll for an entire year.¹⁹⁴

2. Key Contract Terms.

a. Remove or Limit Termination

Every coach should attempt to eliminate a work stoppage as a trigger for termination. While this may be a relatively easy exercise for head coaches, it becomes considerably more difficult for coaches with less experience and market value, hence less negotiating leverage. If the complete removal of work stoppage as a termination trigger is not feasible, extending the grace period prior to termination becomes critical. Again, tolling a coach's contract

189. *Indianapolis Colts Coaching Roster*, COLTS.COM, <http://www.colts.com/sub.cfm?page=coaches> (last visited Feb. 27, 2010).

190. Interview with Larry Kennan, *supra* note 165.

191. Interview with Gary Uberstine, Agent with Premier Sports Management (Feb. 2010). Mr. Uberstine represents several NFL coaches including Seattle Seahawks Head Coach Pete Carroll.

192. In 2009, the per club salary cap was approximately \$128 million. *Final Adjustment Increases Salary Cap*, ESPN.COM, May 15, 2009, <http://sports.espn.go.com/nfl/news/story?id=4169590>.

193. Jarrett Bell, *There's No Cap on Questions*, USA TODAY, Mar. 3, 2010, at 2C.

194. *Id.* In an uncapped year, no NFL club shall have an obligation to contribute to certain player benefit programs including the Second Career Savings Plan, the Player Annuity Program, the Severance Pay Plan, the NFL Player's Supplemental Disability Plan, the Health Reimbursement Accounting, the NFL Player Benefits Committee, the Worker's Compensation Time Offset Fund, the Performance Base Pay, and the Tuition Assistance Plan. NAT'L FOOTBALL LEAGUE, *supra* note 1, at art. XLVI, § 6.

may be a valuable second option here too. Obviously, the longer the grace period the better. A work stoppage during the first two or three months of the League Year should start the grace period to run or result in a salary reduction.

Rationale: As a starting point, the removal of a club's right to terminate a coach as a result of a work stoppage is critically important. As a practical matter, unless a coach maintains a current and marketable non-coaching skill set, there are not likely to be many employment opportunities available in today's economy that compensate the coach even at the level of fifty percent of his NFL coach contract salary. Moreover, although federal law protects the health care benefits of recently unemployed workers for a period of time, the costs of securing these benefits can be extraordinarily high.¹⁹⁵

Less experienced coaches earning commensurately less compensation necessarily generate less savings as a result of their termination. Such savings will be further reduced by the club's administrative costs related to the termination including the costs of hiring the terminated coach's replacement after the work stoppage ends and increased unemployment insurance payments. Whether the players are present at the club's facility or not, the coaching staff handles a full slate of duties at least through the end of April.

b. Rights of Publicity

NFL coaching contracts routinely include rights of publicity provisions that assign the coach's right to use his name, likeness, photograph, voice, signature, biographical information, etc., to the club.¹⁹⁶ These provisions are qualified; however, in the circumstances where the club provides prior written consent.¹⁹⁷ Clubs frequently coordinate their players' participation in the commercial or promotional activities of their sponsors, and players are often paid for such participation. Obviously, the players will not be representing the clubs at these activities during a lockout. It makes sense for coaches to offer their services in this regard as consideration for (1) eliminating a work stoppage as a for cause termination trigger; (2) limited or no reduction in the coach's base salary; or (3) direct payment from the sponsor. The increased exposure of the club's coaches at promotional, corporate, civic, and charitable activities inserts League ambassadors in the club's community at a time when they may be most needed. The marketing departments of NFL clubs are well equipped to leverage the use of the club's coaches. Elevating the profile of a

195. See DOL.GOV, <http://www.dol.gov/dol/topic/health-plans/cobra.htm> (last visited Apr. 1, 2010), for information about the Consolidated Omnibus Budget Reallocation Act (COBRA).

196. Lattinville & Boland, *supra* note 93, at 153.

197. *Id.*

coaching staff expands the club's reach within its community, a benefit that will continue when the players return.

It is important to note that an appropriate license or permission from NFL Properties, the NFL's licensing arm, will be required to the extent the coaches' participation involves the public use of the League's trademarks and logos.¹⁹⁸

c. Reassignment Provisions

A temporary reassignment provision may be a worthy consideration for an NFL coach. Although these provisions are generally avoided in college coaching contracts, they make sense in the context of a work stoppage. Reassignment provisions give the employer the right to transition a coach into a front office or other administrative job.¹⁹⁹ Skills learned during the reassignment could lead to a more well-rounded skill set that rewards assistants with head coaching or front office positions later in their careers. There is successful precedent for the cultivation of administrative skills; consider, for example, former Giants, Jets, and Patriots' Head Coach and current Miami Dolphins' President Bill Parcells,²⁰⁰ former NFL Offensive Line Coach and current Raiders' Personnel Director Keith Rowen,²⁰¹ and former Green Bay Packers' and Seattle Seahawks' Head Coach and current Cleveland Browns' General Manager Mike Holmgren.²⁰² Care should be taken in limiting the reassignment rights to a period of work stoppage and to certain higher-level functions. A blanket reassignment right could endanger a coach's role during the NFL season or could subject a coach to tasks not commensurate with his skills and experiences.

A reassignment may be critically important for those coaches working for a club that participates in the NFL's Pension Plan (Plan). The Plan provides benefits to both coaches and front office employees of member clubs.²⁰³

198. NFL Properties, Inc. is the NFL's exclusive representative for licensing and protection of the NFL trademarks, including the name, logos, symbols and other identifying marks, and that of its member clubs. *NFL Properties, Inc. v. BBC Ab.*, No. D2000-0147 (2000) (Page, Arb.), available at <http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-0147.html>.

199. Athena Yiamouyiannis & Heather Lawrence, *Coaches and Employment Contracts*, COACHING.USOLYMPICTEAM.COM, <http://coaching.usolympicteam.com/coaching/kpub.nsf/v/31feb09> (last visited Apr. 2, 2010).

200. See *Bill Parcells Information*, MIAMIDOLPHINS.COM, <http://www.miamidolphins.com/content/bill-parcells> (last visited Apr. 2, 2010).

201. Eric Strauss, *Keith Rowen Reportedly Joins Personnel Staff*, SILVER AND BLACK REPORT, May 29, 2008, http://www.sbreport.net/raider_news/008/58.html.

202. See *Cleveland Browns Team Front Office*, CLEVELANDBROWNS.COM, http://www.clevelandbrowns.com/team/frontoffice_detail.php?id=321 (last visited Apr. 2, 2010).

203. NAT'L FOOTBALL LEAGUE, NATIONAL FOOTBALL LEAGUE CLUB EMPLOYEE PENSION PLAN 1 (1989) [hereinafter EMPLOYEE PENSION PLAN].

Coaches must log 1000 hours of service between April 1 and March 31 of the following year in order to earn a year of vesting service.²⁰⁴ Coaches vest in the Plan pursuant to the following schedule: after three years of vesting service, 60%; after four years of vesting service, 80%; and full vesting after five years of vesting service.²⁰⁵ If a coach is terminated, the non-vested portions of his benefits are forfeited.²⁰⁶ So, continued employment is important for these coaches covered by the Plan in order to avoid forfeiting Plan benefits or as a means to earn greater Plan benefits.

d. Voluntary Deferral of Compensation

Consider Suspending 401(k) Plan Deferrals. Generally, it is advisable to maximize deferral opportunities under a 401(k) plan since income taxes are deferred on the contributions, as well as earnings thereon, until actual receipt from the plan in retirement.²⁰⁷ Further, as an added incentive, many 401(k) plans offer an employer matching contribution that is conditioned on a certain level of deferrals by eligible employees.²⁰⁸ However, NFL coaches who need to supplement their savings in preparation for a prolonged work stoppage should consider whether it makes sense in their particular circumstances to temporarily suspend their 401(k) plan contributions until the League's labor issues are resolved, for the following reasons:

1. *No guarantee of access to 401(k) plan distributions.* First, by law, 401(k) plan balances (as well as matching contribution account balances) cannot be distributed earlier than a plan participant's separation from service, disability, death, financial hardship, or attainment of age 59½.²⁰⁹ As explained above, in many cases a coach's employment will not be formally terminated by a club, at least not at the onset of a work stoppage. Accordingly, absent a termination of employment (or voluntary resignation of employment by the coach), a "separation from service" necessary for the plan's

204. *Id.* at 1, 6; see Lattinville & Boland, *supra* note 93, for a summary of the Pension Plan's features.

205. EMPLOYEE PENSION PLAN, *supra* note 203, at 8.

206. *Id.* at 15.

207. In 2010, subject to the terms of an employer's 401(k) plan, eligible employees can elect to defer up to \$16,500 (or, if they have attained age 50, or will turn age 50 before the close of the year, \$22,000) of their gross compensation. 26 I.R.C. § 401(k) (2006).

208. See *401(k) Employer Matching Contribution Basics*, 401KCENTER.COM, <http://401kcentr.com/design/match.htm> (last visited Apr. 2, 2010).

209. 26 I.R.C. § 401(k).

administrator to approve a distribution will not have occurred. Only a coach who has attained age 59½ and whose club's 401(k) plan permits an "in-service" distribution upon attainment of age 59½ is assured of the right to access his 401(k) plan balance during a work stoppage.²¹⁰

2. *10% early distribution penalty tax.* Even if a coach's employment is terminated and he becomes entitled to a distribution of his 401(k) plan benefits, the coach will suffer a 10% penalty tax in addition to ordinary income tax unless he has attained age 59.5.²¹¹

3. *Participation in a NQDCP.* NFL coaches should also consider seeking to have their clubs institute a non-qualified deferred compensation plan or arrangement²¹² (NQDCP) under which they could voluntarily defer future salary and bonuses, either as an alternative or supplement to the 401(k) or other qualified retirement plan in which they participate. A NQDCP could serve two important purposes for coaches. First, deferring under a NQDCP would facilitate setting aside additional funds in the short-term, on a tax deferred basis. Unlike a 401(k) plan, the amounts saved under a NQDCP could be paid to the coach during a work stoppage even if he remains employed by his club and has not attained age 59½, without being subject to the 10% penalty tax associated with 401(k) plans.²¹³ Second, a NQDCP has great utility as a long-term tool for coaches to achieve financial security in retirement, particularly in the case of coaches employed by clubs who are discontinuing their participation in the NFL's Pension Plan.²¹⁴

210. § 401(k).

211. See 26 I.R.C. § 72(t) (2010).

212. For purposes of this discussion, a "nonqualified deferred compensation plan or arrangement" refers to a plan intended to defer the receipt of income until retirement or termination of employment other than plan described in Sections 401(a), 401(k), 403(b) or 457(b) of the Code. 26 I.R.C. §§ 401(a), (k), 403(b), 457(b) (2010).

213. See *id.*

214. The authors understand that nine NFL clubs have ceased contributing to the NFL Pension Plan, and that more clubs are expected to follow suit. John McClain, *Texans to Keep Gibbs Despite Dispute; 9 NFL Teams Anger Assistants By Opting Out of Pension Plan*, CHRON.COM, May 8, 2009, <http://www.chron.com/disp/story.mpl/sports/fb/texansfront/6413906.html>.

4. *Ability to save on a pretax basis.* To illustrate, consider a coach who elected to defer \$4,000 of his monthly club salary beginning June 1, 2010. As of May 31, 2011 (logically, the earliest date for an offensive lockout as explained above), the coach would have accumulated a \$48,000 “rainy day” fund (ignoring investment earnings on the deferred salary). Absent a deferral arrangement, a coach in a 40% combined federal, state, and local income tax bracket would have accumulated only \$28,800 over the same period, net of the cost of current income taxes (again, ignoring investment earnings on the saved amounts). While the coach would be subject to taxes upon receipt of payments under the deferred compensation arrangement, he would expect to be in a lower tax bracket in the year of a prolonged work stoppage due to the loss or reduction of his club salary.²¹⁵ Further, it is plausible that the

215. Under the current federal income tax rate structure, a coach who is married and filing a joint return is subject to the following marginal income tax rates for the year ending December 31, 2010:

Taxable Income	Marginal Tax Rate	Maximum Marginal Tax Liability	Maximum Aggregate Tax Liability
0 - \$16,700	10%	\$1,670	\$1,670
Over \$16,700 - \$67,900	15%	\$7,680	\$9,350
Over \$67,900 - \$137,050	25%	\$17,288	\$36,638
Over \$137,050 - \$208,850	28%	\$20,104	\$46,742
Over \$208,850 - \$372,950	33%	\$54,153	\$100,895
Over \$372,950	35%	\$Unlimited	\$100,895 + 35% of amount over \$372,950

2010 Individual Income Tax Rates, Standard Deductions, Personal Exemptions, and Filing Thresholds, TAX POLICYCENTER.ORG, Oct. 26, 2009, http://www.taxpolicycenter.org/taxfacts/content/PDF/individual_rates.pdf. Based on the foregoing, a coach earning \$350,000 annually will be in the 33% marginal tax bracket and can expect to pay \$93,322 per year in federal income tax. If that coach earned \$150,000 annually, he will be in the 28% marginal tax bracket and can expect to pay \$40,264 per year in federal income tax. The following table shows President Obama’s proposed revised marginal income tax rates that, if approved, would be effective for the year ending December 31, 2011:

coach would avoid altogether, rather than merely defer, federal payroll taxes (known as FICA and Medicare taxes) on the deferred salary.²¹⁶

In order to obtain the tax advantages described above, the coach's deferral arrangement must conform to a number of well-entrenched principles of federal income tax law. These principles would restrict the coach from deferring taxes on amounts that have already been received, whether actually or constructively.²¹⁷ Additionally, with respect to any amount deferred, the coach could not have any rights to payment by the club that exceeded the rights of a general, unsecured creditor of the club.²¹⁸

Taxable Income	Proposed Marginal Tax Rate	Maximum Marginal Tax Liability	Maximum Aggregate Tax Liability
0 - \$16,700	10%	\$1,670	\$1,670
Over \$16,700 - \$67,900	15%	\$7,680	\$9,350
Over \$67,900 - \$137,050	25%	\$17,288	\$36,638
Over 137,050 - \$208,850	28%	\$20,104	\$46,742
Over \$208,850 - \$372,950	36%	\$59,076	\$105,818
Over \$372,950	39.6%	\$Unlimited	\$105,818 + 35% of amount over \$372,950

Daniel Gross, *War on the Rich? The Bogus GOP Claim That Obama is Trying to Bleed Wealthy Americans*, SLATE, Mar. 5, 2009, <http://www.slate.com/id/2213029/>. Based upon the foregoing, a coach earning \$350,000 annually will be in the 36% marginal tax bracket and can expect to pay \$97,556 per year in federal income tax. If that coach earned \$150,000 annually, he will be in the 28% marginal tax bracket and can expect to pay the same amount as under the current marginal tax rates.

216. See 26 I.R.C. § 3121(v) (2010).

217. See 26 I.R.C. § 451; Treas. Reg. § 1.446-1(c)(1)(i) (2009); Treas. Reg. § 1.451-1(a), 2(a) (2009) (“[I]ncome is not constructively received if the taxpayer’s control of its receipt is subject to substantial limitations or restrictions”).

218. Rev. Rul. 60-31, 1960-1 C.B. 174, *modified by* Rev. Rul. 70-435, 1970-2 C.B. 100. In an effort to provide added security to employees without forfeiting the beneficial tax treatment with respect to deferred compensation arrangements, practitioners have developed a mechanism referred to as a “rabbi trust.” David B. Bruckman, *Implementing and Exiting Rabbi Trusts*, NYSSPCA.ORG, <http://www.nysscpa.org/cpajournal/2003/0303/features/f033403.htm> (last visited Apr. 2, 2010). Generally, rabbi trusts are used as a means of segregating deferred compensation and any earnings on the deferred compensation from a club’s other assets so that management cannot dip into the contributions and earnings to fund club operations. *Id.* The trust’s assets are available to satisfy claims of general unsecured creditors if and only if the employer becomes bankrupt or insolvent. *Id.* This structure has two consequences. See *id.* First, there is no current economic benefit conferred to participants with respect to the trust’s assets, thus the participants are not taxed when assets are transferred to the trust. *Id.* Second, the employer is treated as the owner of the trust for tax purposes and must account for any trust income on its tax returns. *Id.*

Deferred compensation arrangements became subject to a more comprehensive set of standards as a result of the addition of Internal Revenue Code Section 409A, enacted as part of the American Jobs Creation Act of 2004, and generally effective for amounts deferred in years after 2004.²¹⁹ The Internal Revenue Service has issued extensive regulations upon which taxpayers can rely in interpreting Section 409A.²²⁰ The consequences of a deferred compensation arrangement's failure to conform to Section 409A, whether in form or in operation, are severe; not only are amounts deferred by or for the employee accelerated into income (defeating the intended purpose of the arrangement), but also the employee is subject to a punitive excise tax.²²¹ Accordingly, it is imperative that any deferral arrangement considered by a coach and his club employer be structured in a manner that conforms to Section 409A.

An exhaustive discussion of the traditional principles of deferred compensation, let alone Section 409A, is beyond the scope and purpose of this article. Therefore, the discussion below is limited to the most salient considerations for coaches and their clubs who wish to explore establishing a deferred compensation arrangement intended to create a financial safety net for coaches in the event of work stoppage.

i. Timing of Deferral Election.

Generally, an election to defer compensation for services performed during a taxable year must be made before the beginning of the service provider's year.²²² There are two exceptions to this general rule. First, in the year in which an employee first becomes eligible to participate in a deferred compensation plan, the employee may make a deferral election with respect to future compensation only.²²³ The election must be made within thirty days after initial eligibility.²²⁴ Second, employees may make a deferral election with respect to performance-based compensation based on services performed over a period of at least twelve months, so long as the election is made at least six months before the end of the service period.²²⁵

219. Pub. L. No. 108-357, § 885(d)(1), 118 Stat. 1634 (2004).

220. Treas. Reg. § 1.409A-1 (2009).

221. Amounts deferred under a nonqualified plan that does not conform to Section 409A are includible in income and subject to an additional tax of 20% as soon as the deferred amounts are no longer subject to a substantial risk of forfeiture. 26 I.R.C. § 409A(a)(1)(B)(i)(II) (2010).

222. 26 I.R.C. § 409A-(a)(4)(B)(i); Treas. Reg. § 1.409A-2(a)(3) (2007).

223. 26 I.R.C. § 409A-(a)(4)(B)(ii); Treas. Reg. § 1.409A-2(a)(7)(i) (2007).

224. *Id.*

225. 26 I.R.C. § 409A-(a)(4)(B)(iii); Treas. Reg. § .409A-2(a) (2007).

ii. Amount of Deferral.

Unlike 401(k) plans, there is no annual limit on the amount of compensation that a coach may elect to defer. However, a club may seek to impose a limit on the amount that its coaches may defer, since the club will not be able to claim a tax deduction for the compensation deferred until the year in which it is actually paid to and recognized as income by the coach who made the deferral.²²⁶

iii. Payment of the Deferred Compensation.

Generally, Section 409A prohibits an employee from receiving payments of deferred compensation until he has retired or otherwise “separated from service.”²²⁷ As discussed above, coaches’ contracts do not necessarily call for the termination of a coach’s employment upon the occurrence of a work stoppage. Therefore, absent the right to obtain an “in-service” distribution under Section 409A, a deferred compensation arrangement could have limited or no utility to a coach in these circumstances.

Fortunately, Section 409A permits a distribution prior to an employee’s separation from service, but only if the distribution is made “at a specified time (or pursuant to a fixed schedule) specified under the plan at the time of the deferral of such compensation.”²²⁸ The date must be currently ascertainable and not contingent upon a future event.²²⁹ The distribution may be spread over a future period according to a fixed schedule, so long as the plan so provides and the schedule is established at the time of deferral.²³⁰ As a result, clubs and coaches may want to consider including in a deferred compensation plan a fix date by which time the parties reasonably believe any work stoppage would end, at which time distributions will be made, or include a fixed schedule pursuant to which distributions will be made.

iv. ERISA “Top Hat” Exemption.

Another consideration of critical importance to the club is that a deferral arrangement entered into with one or more of its coaches be exempt from compliance with the federal law governing employer sponsored pension plans,

226. See Kevin E. Murphy, Mark Higgins & Tonya K. Flesher, *Concepts In Federal Taxation* G13 (2009).

227. 26 I.R.C. § 409A-(a)(2)(A)(i); Treas. Reg. § 1.409A-3(i)(2) (2007).

228. 26 I.R.C. § 409A-(a)(2)(A)(iv); Treas. Reg. § 1.409A-3(a)(4), (b) (2007).

229. H.R. Rep. No. 108-755, at 730 (2004) (asserting that an employee may not specify the distribution date as “the date on which my daughter enrolls in college”).

230. 26 I.R.C. § 409A-(a)(2)(A)(iv).

the Employee Retirement Income Security Act of 1974, as amended (ERISA).²³¹ Generally, plans that fall within ERISA's purview require that contributed amounts effectively be held in trust, with the employee having received an economic benefit equal to the contributed amount; as a result, there is no tax benefit to the employee with respect to the contributed amount, which would be currently taxable.²³² Plans that are "unfunded" and "maintained by an employer primarily for the purpose of providing deferred compensation to for a select group of management or highly compensated employees," commonly known as "top hat" plans, are exempt from ERISA provided that the plan is registered with the Employee Benefit Security Administration (EBSA) through an abbreviated filing.²³³

While coaches would not likely be considered members of a select group of management, there is no clear guidance as to whether coaches would be considered "highly compensated employees" so that their deferred compensation arrangements would be exempt from ERISA as top hat plans. ERISA does not define "highly compensated employees" for this purpose, and the United States Department of Labor (Department) has provided limited guidance.²³⁴ Commentators have suggested that it is doubtful that the Department would affirmatively identify a group that meets the top-hat criteria, in part because, since the early years, the Department has avoided such affirmations, even where one might think the facts strongly suggested a position fell within the top-hat group.²³⁵ That said, a federal court of appeals recently determined that a group of employees who, on average, annually earned five times more than the average income of the employer's employees as a whole, constituted a group of highly compensated employees for purposes

231. Pub. L. 93-406, 88 Stat. 829 (1974).

232. See *Sproull v. Comr.*, 16 T.C. 244 (1951), *aff'd per curiam*, 194 F.2d 541 (6th Cir. 1952).

233. ERISA Section 4(b)(5), 201(2), Op. PWBA Office of Regulations and Interpretations (May 19, 1992), available at <http://www.dol.gov/ebsa/programs/ori/advisory92/92-13a.htm>.

234. The United States Department of Labor has, in a couple of cases, specified groups that were *not* top hat. Op. Dept. of Labor No. 79-75A, 1-2 (Oct. 29, 1979) (emphasis added) (stating that a secretary does not meet top-hat criteria); Op. Dept. of Labor No. 85-37A, 2 (Oct. 25, 1985) (stating that 50 out of 750 employees, including "foremen, a superintendent, an assistant in the cost department, an order department clerk, an expeditor, a stepmaster inventory control position and an insurance position" do not meet top-hat criteria). Immediately after the enactment of ERISA, the Department of Labor issued a series of rulings wherein the Department determined that the identified classes constituted a "select group of management or highly compensated employees." Op. Dept. of Labor No. 75-48, 2 (Dec. 23, 1975); see also, e.g., Op. Dept. of Labor No. 75-63 (July 22, 1975); Op. Dept. of Labor No. 75-74 (Aug. 1, 1975).

235. BNA TAX MANAGEMENT PORTFOLIO 385; DEFERRED COMPENSATION ARRANGEMENTS, A-77 (updated June 8, 2009), citing Op. Dept. of Labor (Unnumbered), 1985 DOL LEXIS 63 (Oct. 22, 1985) (refusing to affirm that a senior vice president of a large trade association meets the top-hat criteria).

of applying the top-hat exemption.²³⁶

e. Be Frugal

To NFL assistant coaches working under a contract with a work stoppage clause, spending less and saving more is important. In anticipation of factors such as the cessation of regular paychecks, potentially higher capital gains tax rates in 2011 as part of an overall tax rate increase, and other factors, smart financial planning should be continued or adopted. Since the mindset of most coaches is necessarily focused on the development of others, it may be a unique but clearly necessary exercise for them to consider themselves and their families first. Basic financial planning and tax savings techniques warrant the following consideration.

i. Take Deductions in 2010.

In anticipation of lower income in 2011, coaches may try to shift tax deductions that might normally be taken in 2011 into 2010. For instance, prepaying the January 1 mortgage payment in late December would allow for a greater mortgage loan interest deduction in 2010. With a lower expected income in 2011, deductions become more valuable in 2010.

ii. Lifestyle Choices.

The array of cost cutting measures can be as diverse as the lifestyles of each of the League's coaches. From limiting the relative luxury of drive-through coffee or a new car, to seeking the adjustment of child support obligations, a broad consideration of cost savings measures will be a prudent exercise.

236. See *Alexander v. Brigham and Women's Physicians Organization, Inc.*, 513 F.3d 37, 46 (1st Cir. 2008). In *Alexander*, the employer physician group offered two deferred compensation plans to all of the group's surgeons, who constituted approximately 30% of group's employee base. *Id.* at 40-41. If a surgeon's net practice income exceeded a pre-determined amount, the surgeon could contribute a part of the excess to the plans. *Id.* at 41. If a surgeon's net practice income fell short of the pre-determined amount, the physician was obligated to the practice for the difference (either out of pocket or by forfeiting contributions made to the plans). *Id.* *Alexander* was terminated and owed the group money under this formula, which the group satisfied out of *Alexander's* plan contributions. *Id.* *Alexander* sued, arguing, in part, that the plans violated ERISA's vesting and fiduciary duty provisions. *Id.* at 42. *Alexander* contended that, because the plans were offered to 30% of the group's employees, the ERISA top-hat exemption did not apply. *Id.* at 45. The First Circuit rejected *Alexander's* arguments and held that, because only a select group of surgeons had net practice incomes sufficient to contribute to the plans, and those contributing physicians, on average, earned more than five times the average income of the group's employees, the contributing physicians constituted "highly compensated employees." *Id.* at 46. As a result, the plans fell within ERISA's top-hat exemption. *Id.*

f. Insurance

Strike insurance, sold through specialty underwriters, is available to cover lost income as a result of a work stoppage.²³⁷ To be eligible, the beneficiary cannot be a party to the underlying labor contract but must be directly affected by it.²³⁸ Although the NFL's coaches qualify for such insurance, the relatively imminent timing of an NFL work stoppage and the broadly divergent contract treatment of NFL coaches in that circumstance makes the acquisition of work stoppage insurance to cover potential lost wages an impractical solution. The premiums for such insurance would be unreasonably expensive if such a product were available at all. The premium costs would likely equal or exceed the cost of the benefits. If the work stoppage never occurs, the funds used to pay the premiums are not recoverable. So, third party insurance is not a viable remedy at this time.

VI. CONCLUSION

Conditions are ripe for a work stoppage in the NFL in 2011. The history of work stoppages in professional sports in the United States, particularly the NFL, suggests that a lockout is likely to begin at the start of, or close to the start of, the regular season. The exact duration of the lockout is challenging to estimate although the opportunity costs of a work stoppage in this eight billion dollar per year industry weigh heavily in favor of an abbreviated lockout. There is a limited but important array of contract negotiation keys that can reduce the impact of the work stoppage on the NFL's coaches.

In the future, clubs and coaches may be more proactive in addressing the consequences of a work stoppage collectively. Unionization of NFL coaches is an obvious but impractical, and potentially unavailable, option. A more effective approach would be the establishment of a self-insurance fund available to cover lost wages in the event of a work stoppage. Because of the disparate contract treatment of the NFL's coaches in this circumstance, funding an insurance pool on a League-wide basis may also be impractical, as some coaches and clubs may not have a need for such insurance, and some clubs may not wish to participate.

The most practical and effective way for NFL coaches to concurrently mitigate lost wages resulting from a work stoppage and supplement retirement benefits is to negotiate smarter contracts and implement deferred

237. Kenneth J. St. Onge, *Broadway and Hollywood Walkouts Raise Interest in Strike Insurance*, INSURANCEJOURNAL.COM, Dec. 7, 2007, <http://www.insurancejournal.com/news/national/2007/12/07/85489.htm?print=1>.

238. *Id.*

compensation arrangements such as those discussed in this Article.

