

2022

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Repository Citation

Christopher R. Deubert, *Labor & Employment Law Guidance for Professional Sports Teams*, 32 Marq. Sports L. Rev. 359 (2022)

Available at: <https://scholarship.law.marquette.edu/sportslaw/vol32/iss2/2>

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ARTICLES

LABOR & EMPLOYMENT LAW GUIDANCE FOR PROFESSIONAL SPORTS TEAMS

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This Article is intended to be a resource for counsel providing advice to professional sports teams, either in-house or at a law firm. Counsel for professional sports handle a wide range of legal issues. Nevertheless, labor and employment is typically one of the most important and consistent areas of practice. Moreover, the handling of labor and employment law issues transcends legal compliance to helping form the foundation and infrastructure for a welcoming and successful work environment. This Article provides guidance on labor and employment issues, with particular focus on issues relevant in the sports industry.

INTRODUCTION

Working in the sports industry can be exciting—you get to be involved in the creation, production, and management of events that millions of people around the world love watching and attending. At the same time, it can be demanding as many in the industry work longer and more irregular hours and for less pay than they might in another industry. Moreover, the industry can be highly competitive, particularly as people seek to break into sports or advance their careers, often by relocating to a new city. All of these factors and more contribute to the differentiation of sports from other industries in which to work.

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** Portions of this article appear in blog posts at *Blog*, LAW OFFICE OF CHRISTOPHER R. DEUBERT, ESQ., <https://www.deubertlaw.com/blog>.

Counsel for professional sports teams must be aware of the unique nature of the industry and prepare and respond accordingly. While attorneys working in-house for professional sports teams engage with a wide variety of practice areas,¹ providing legal guidance on labor and employment matters concerning the club's employees is undoubtedly one of the principal duties.

This Article summarizes the application of key labor and employment law issues to professional sports teams as well as labor and employment law issues unique to such teams. Part I of the Article focuses on issues most relevant to business staff, *i.e.*, the staff responsible for tickets, sponsorships and other commercial and administrative activities rather than winning and losing games on the field, court, or ice. Part II will focus on those employees responsible for the on-the-field success of the club, such as players, coaches, general managers, and others.

I. BUSINESS STAFF CONSIDERATIONS

Given its high-profile nature, the size of the sports industry and the organizations within it can often be overestimated.² For example, the NFL's 2019 revenues of \$16 billion³ are lower than that of any Fortune 500 company.⁴ Sports teams outside the Big Four of the NFL, MLB, NBA, and NHL generally have revenues below \$41.5 million annually, which qualifies each of them as a small business with the federal Small Business Administration.⁵ Lastly, sports teams generally have between 50 and 250 employees, which is generally characterized as a small to medium-sized enterprise.⁶

Nevertheless, the successful operation of a professional sports team requires competent professionals in a wide range of fields. Sports teams typically have

1. Christopher R. Deubert et al., *General Counsels in Sports: An Analysis of the Responsibilities, Demographics, and Qualifications*, 6 ARIZ. ST. SPORTS & ENT. L.J. 229, 232-42 (2017).

2. GLENN M. WONG, *THE COMPREHENSIVE GUIDE TO CAREERS IN SPORTS* 5-6 (2d ed. 2013).

3. Mike Florio, *NFL Revenue Drops from \$16 Billion in 2019 to \$12 Billion in 2020*, PRO FOOTBALL TALK (Mar. 11, 2021, 4:51 PM), <https://profootballtalk.nbcsports.com/2021/03/11/nfl-revenue-drops-from-16-billion-to-12-billion-in-2020/> [<https://perma.cc/BZT3-WZCT>].

4. See Fortune, *Global 500*, <https://fortune.com/global500/2020/search/> (last visited Apr. 1, 2022).

5. See *Table of Small Business Size Standards Matched to North American Industry Classification System Codes*, U. S. SMALL BUSINESS ADMINISTRATION (Aug. 19, 2019), available at https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards_Effective%20Aug%2019%2C%202019_Rev.pdf (setting \$41.5 million threshold for NAICS Code 711211 – Sports Teams and Clubs).

6. See *Glossary of Statistical Terms, Small and Medium-Sized Enterprises (SMEs)*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, <https://stats.oecd.org/glossary/detail.asp?ID=3123> [<https://perma.cc/BX5A-RWA8>] (last visited Apr. 1, 2022); *Small And Midsize Business (SMB)*, GARTNER, <https://www.gartner.com/en/information-technology/glossary/smb-small-and-midsize-businesses> [<https://perma.cc/KU7U-7Q67>] (last visited Apr. 1, 2022).

individuals working in at least the following fields: communications/media relations, community relations, events, digital media, finance, human resources, information technology, legal, marketing, operations, sponsorships, and ticket sales.⁷ These fields also include a variety of subspecialties.⁸ Finally, if the team's ownership also owns the stadium or arena in which the team plays, then there will be even more employees dedicated to the successful operation of the facility.⁹

As stated in the Introduction, the sports industry can be a unique workplace with particularized considerations and challenges. At the same time, a professional sports team is still a place of employment and subject to the same laws and regulations as any other workplace. Moreover, sports teams operate in a competitive landscape and thus also must be cognizant of and responsive to employment best practices. This Part will review some of those laws, regulations, and best practices and their specific application to the sports team workplace, including the issues of employee handbooks, compensation and hours of work, internships and independent contractors, multi-jurisdictional operations, dispute resolution and employee separations, confidentiality and social media, sports betting, diversity and demographics, and other miscellaneous issues.

Lastly, while this section focuses on business staff, some of these issues are also relevant to team staff, which will be noted when helpful to the discussion.

A. *Employee Handbooks*

As a preliminary matter, many of the policies and best practices discussed herein should be included in an employee handbook. Employee handbooks serve multiple purposes—they can and should be a useful resource to employees, describing workplace expectations and benefits available to them. At the same time, handbooks help employers by putting employees on notice of the employer's policies and rules and the possibility of discipline or termination in the event of a violation.¹⁰

7. See, e.g., *St. Louis Cardinals, Front Office Directory*, MLB.COM, <https://www.mlb.com/cardinals/team/front-office> [<https://perma.cc/NT87-RSNH>] (last visited Apr. 1, 2022); *Front Office, NEW YORK GIANTS*, <https://www.giants.com/team/front-office-roster/> [<https://perma.cc/UFL7-X4WY>] (last visited Apr. 1, 2022).

8. *Front Office Directory*, *supra* note 7; *Front Office*, *supra* note 7.

9. See Wong, *supra* note 2, at ch. 31.

10. See Stephen F. Befort, *Employee Handbooks and Policy Statements: From Gratuities to Contracts and Back Again*, 21 EMP. RTS. & EMP. POL'Y J. 307, 307-08 (2017); Christian Zinn, *Employee Handbooks: Why Do I Need to Have One?* 13 NO. 7 NEV. EMP. L. LETTER 5 (Apr. 2008).

It is important that employers ensure that employees are actually aware of the handbook's policies, particularly those which could result in discipline or termination. Consequently, employers should do the following: (1) review, update and disseminate the handbook on an at least annual basis to ensure that the handbook continues to reflect the employer's policies and practices; (2) hold at least annual hour-long meetings with staff to review the handbook, with particular attention on those policies that could result in discipline or termination; and, (3) include in the handbook a signature page in which the employee acknowledges having received the handbook and agrees to comply with its directives. New employees should receive and sign the handbook upon joining the team. The content of this signature page will be discussed in additional sections below.

Employers must also be careful to make sure that the handbook does not alter the at-will employment arrangement. The following are sample sections of text that should be included in the handbook, either in their own section or in multiple places as necessary:

- Neither this Handbook, nor any other organizational document, confers any express or implied contractual right to remain an employee, nor does it guarantee any fixed term or condition of your employment. Your employment is not for any specific period of time and may be terminated at will, with or without cause, and without prior notice for any reason at any time.
- You and [Team] are in an "at-will" employment relationship. In other words, employment at [Team] is not limited to any specific period of time and may be terminated at will. This means that either you or [Team] may terminate the employment relationship at any time, with or without reason or advance notice.

Such provisions are essential to help defend against former employees who might assert claims asserting that the handbook was a binding employment contract in some way.¹¹

Lastly, teams should create employment handbooks tailored to their specific employee populations. This is likely to consist of at least two handbooks: (1) the team's full-time staff working in a variety of professional roles; and, (2) the team's part-time employees paid hourly to work the team's games. The job

11. See Befort, *supra* note 10, at 313-14.

benefits, expectations, and policies are likely different between these populations and thus each should receive a handbook adapted to their situation.

B. Compensation & Hours of Work

Compensation arrangements and the hours of an employee's work are obviously among the most important terms and conditions of an employee's employment. The Federal Fair Labor Standards Act (FLSA) is the principal federal law governing these issues. The FLSA sets forth a minimum wage of \$7.25/hour¹² and requires that employees who work more than 40 hours in a week, *i.e.*, overtime, be paid "at a rate not less than one and one-half times the regular rate at which he is employed."¹³ Importantly, the FLSA exempts a variety of employees from these requirements,¹⁴ including of most relevance here "any employee employed in a bona fide executive, administrative, or professional capacity... or in the capacity of outside salesman."¹⁵

The U.S. Department of Labor, responsible for enforcement of the FLSA, sets forth the requirements to be considered exempt from the law.¹⁶ Importantly, an employee's title "is insufficient to establish the exempt status of an employee."¹⁷ Consequently, it is useful to list out the requirements for each position to be considered exempt:

- An executive must: (1) be "[c]ompensated on a salary basis at a rate of not less than \$455 per week"¹⁸; (2) have as his or her "primary duty... management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof"¹⁹; (3) "customarily and regularly directs the work of two or more other employees"; and²⁰ (4) have the "authority to hire or fire other employees or whose suggestions and

12. 29 U.S.C. § 206(a)(1)(c).

13. 29 U.S.C. § 207(a)(1).

14. 29 U.S.C. § 213(a), (b).

15. 29 U.S.C. § 213(a)(1).

16. See *Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA)*, U.S. DEP'T OF LAB. WAGE & HOUR DIV., https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fs17a_overview.pdf (last visited Apr. 1, 2022).

17. 29 C.F.R. § 541.2.

18. 29 C.F.R. § 541.100(a)(1).

19. 29 C.F.R. § 541.100(a)(2).

20. 29 C.F.R. § 541.100(a)(3).

recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.”²¹

- An administrative employee must: (1) be “[c]ompensated on a salary or fee basis...at a rate of not less than \$684 per week”²²; (2) have as his or her “primary duty... the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers”; and²³ (3) have as his or her “primary duty... the exercise of discretion and independent judgment with respect to matters of significance.”²⁴
- A professional employee must: (1) be “[c]ompensated on a salary or fee basis... at a rate of not less than \$455 per week”²⁵; and (2) have as his or her “primary duty... the performance of work: (i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or (ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.”²⁶
- Outside salespersons, who are simply defined as employees whose primary duties are to “mak[e] sales,”²⁷ are exempt if they are “customarily and regularly engaged away from the employer’s place or places of business in performing such primary duty.”²⁸

These provisions should cover all or nearly all of a team’s full-time employees, *i.e.*, the employees should be exempt from the FLSA’s minimum wage and overtime laws. However, the salary component may be the most likely source of trouble for a team. Pay of \$684/week is equivalent to an annual salary of

21. 29 C.F.R. § 541.100(a)(4).

22. 29 C.F.R. § 541.200(a)(1).

23. 29 C.F.R. § 541.200(a)(2).

24. 29 C.F.R. § 541.200(a)(3).

25. 29 C.F.R. § 541.300(a)(1).

26. 29 C.F.R. § 541.300(a)(2)(i)-(a)(2)(ii).

27. 29 C.F.R. § 541.500(a)(1); 29 U.S.C. § 203(k).

28. 29 C.F.R. § 541.500(a)(2).

\$35,568. Many entry-level jobs in sports pay around this amount.²⁹ Indeed, commission-based positions, such as ticket sales, may pay base salaries below this threshold.³⁰ Moreover, such positions often work more than forty hours per week, particularly in-season when employees generally attend the team's games in a professional capacity.³¹ To avoid potential FLSA problems, it is advisable for teams to pay their full-time employees a minimum base salary of \$35,568.

Importantly, it is unlikely that part-time employees will meet the criteria to be exempt. Sports teams and venues generally employ hundreds of part-time workers who work on game days as ushers, ticket scanners, guest services staff, parking attendants, security, merchandise or food and beverage concessionaires or in a variety of other roles necessary to the safe and enjoyable operation of a sporting event. The team must comply with FLSA minimum wage and hour laws in paying these employees. Of particular concern might be weeks in which the team has multiple home games (particularly as in MLB) or there are other events in the venue that week. During such weeks, employees could exceed the forty hours per week threshold and therefore be entitled to overtime pay. Sports teams would be wise to employ sufficient part-time employees and rotate their schedules so that no employee ever works more than forty hours per week.

FLSA non-compliance can be expensive. Employees deprived of their rightful wages are entitled to the unpaid amounts plus the same amount as liquidated damages.³² The statute also provides for plaintiff's counsel to recover attorneys' fees.³³ Consequently, FLSA litigation has increased dramatically in the last decade as there are many attorneys who make a living finding and prosecuting FLSA cases.³⁴

In addition to the FLSA, thirty states and the District of Columbia have their own minimum wage laws exceeding the federal minimum wage, with the

29. *Sports Management Salary*, Sports Mgmt. Degree Guide, <https://www.sports-management-degrees.com/salary/> (last visited Apr. 7, 2020).

30. *Ticket Sales Representative Salary*, Salary.com, <https://www.salary.com/research/salary/posting/ticket-sales-representative-salary> (last visited Apr. 7, 2020).

31. See Erienne Weight et al., *Working in the Sports Industry: A Classification of Human Capital Archetypes*, 35 J. Sport Mgmt. 364 (2020).

32. 29 U.S.C. § 216(b).

33. *Id.*

34. See Russell L. Foster, *Plaintiffs' Attorneys "Discover" the Fair Labor Standards Act*, CARVER DARDEN (Dec. 21, 2017), <https://www.carverdarden.com/blog/plaintiffs-attorneys-discover-the-fair-labor-standards-act>; See Lydia DePillis, *Why Wage and Hour Litigation is Skyrocketing*, WASH. POST (Nov. 25, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/11/25/people-are-suing-more-than-ever-over-wages-and-hours/> [<https://perma.cc/2MQR-99TG>].

District of Columbia the highest at \$15.00/hour.³⁵ Sports teams that have offices, training centers, or stadiums in multiple jurisdictions need to be mindful of each jurisdiction's respective minimum wage laws, an issue discussed further in Section I(D).

Professional sports, of course, must also comply with the variety of federal, state, and local laws prohibiting discrimination in employment, including but not limited to Title VII of the Civil Rights Act (*race, color, religion, sex, and national origin*),³⁶ Equal Pay Act (*sex-based wage discrimination*),³⁷ Age Discrimination in Employment Act (persons forty years of age and older),³⁸ and the Americans with Disabilities Act (ADA) (*disability*).³⁹ While there is no sports-specific component to compliance with these laws, it is a generally recommended best practice to carefully monitor and review any discrepancies in pay or benefits within the organization to ensure that employees are being compensated and treated fairly and lawfully. If persons in substantially similar roles have different salaries, it may be wise to document accurate and acceptable reasons for the difference, which may include education, professional experience, tenure with the club, and past performance.

We turn now to a compensation issue common in sports—commissions. Many employees working for sports teams receive a part of their compensation from commissions, including ticket sales representatives and partnership/sponsorship sales representatives. These employees typically receive a specified portion of the revenue they bring to the club and are thus incentivized to work hard and produce. Commission structures should be clearly laid out in a company policy, provided to commission-based employees upon their joining the club, and reviewed at least annually with those employees. Some clubs might have the employees sign the policies to acknowledge their terms but clubs doing so should carefully consider whether they might be seen to have created some type of enforceable employment agreement, vitiating the typical employment at-will relationship.

In determining the commission structure, clubs should consider at least the following:

- When is the employee thought to have earned the commission—when the payment is received or when the

35. *Consolidated Minimum Wage Table*, U.S. DEP'T OF LAB.: WAGE & HOUR DIV. (Jan. 1, 2022), <https://www.dol.gov/agencies/whd/mw-consolidated> [<https://perma.cc/S9EA-27ET>].

36. 42 U.S.C. § 2000e-2(a).

37. 29 U.S.C. § 206(d).

38. 29 U.S.C. § 623.

39. 42 U.S.C. § 12112.

revenue is earned (which might not be until the game for which tickets are sold is played or certain sponsorship assets delivered)?

- How soon after the commission is earned will the commission be paid? Should employees only be paid if the money is received from the ticketholder or sponsor?
- Should the commission rate change based on the nature or amount of the deal? For example, if a league partner decides to do a local partnership with the club—without any material sales effort needed by the club—should a partnership sales representative receive a full commission on that arrangement?
- What if a ticket package, suite, or sponsorship deal comes through another avenue at the club—such as the events department or ownership? Should ticket sales or sponsorship sales representatives receive a full commission?

Whichever structures clubs ultimately choose, the written policy should also explicitly provide management with reasonable discretion to amend commission rates for unforeseen or unique situations or circumstances. Additionally, in setting policies, clubs should be mindful of any local laws governing employee pay. Nearly all jurisdictions have statutes which require wages (often broadly defined) to be paid within certain time periods, particularly when an employee's employment ends.⁴⁰ These laws—and related common law—may dictate when commissions are earned and when they must be paid.⁴¹

Issues related to compensation are vacation and leave policies. Sports teams are obviously busier at different parts of the year, perhaps particularly so in the buildup to each new season and through the season. During the offseason, workloads—and the necessary employees—may be reduced. Clubs need to be mindful of these fluctuations in hours and craft fair and competitive policies accordingly. For example, a standard policy of ten or fifteen days off in a given year is likely not the best fit for a sports team, particularly teams that play during the summer. Instead, teams should consider allowing certain numbers of days off during different parts of the year, subject to supervisor approval. The team should also recognize when staff have worked a particularly heavy stretch (such as a homestand) and provide days off following those stretches.

40. See Samuel J. Samaro, *The Case for Fiduciary Duty as a Restraint on Employer Opportunism Under Sales Commission Agreements*, 8 U. PENN. J. LAB. & EMP. L. 441, 446-47 (2006).

41. See *id.* at 442-49.

In crafting vacation and leave policies, clubs need to be mindful of how unused vacation or sick days are treated upon the employee's separation. Twenty-four states and the District of Columbia have laws governing the treatment of such days, including that the value of such days be included as part of an employee's last paycheck.⁴² To avoid potential problems, clubs need robust tracking systems of days used by employees. Alternatively, employers can offer unlimited vacation and personal days, subject to supervisor approval and limitation in the event of abuse. Nevertheless, it is often the case that unlimited vacation policies actually result in employees taking less days off.⁴³

Finally, the Family Medical Leave Act (FMLA) is an important federal law about which all employers must be aware. The FMLA provides employees the right to take twelve weeks of leave unpaid in a year for the birth of a child or to care for a spouse, child or parent who has a serious health condition.⁴⁴ While the FMLA is helpful, it is often regarded as insufficient, particularly as compared to comparable countries' policies.⁴⁵ Consequently, ten jurisdictions (California, Colorado, Connecticut, District of Columbia, Massachusetts, New Jersey, New York, Rhode Island, Oregon, and Washington) have passed their own legislation requiring paid leave of some kind.⁴⁶ Teams operating in these states must therefore be sure to comply with these laws. Additionally, teams operating in jurisdictions which have not passed their own paid leave laws should carefully consider whether to provide such leave.

Sports teams face competing pressures in the employment space. On the one hand, many people want to work in the sports industry and are therefore willing to accept lower pay and work more hours. On the other hand, teams that

42. *Final Pay: Getting Your Last Paycheck*, WORKPLACE FAIRNESS, <https://www.workplacefairness.org/final-pay> [https://perma.cc/V8ZC-E72T] (last visited Apr. 1, 2022).

43. Taylor Cotterell, *Proceed With Caution: Unlimited PTO May Sound Great, But Could Harm Company Culture*, FORBES (Dec. 12, 2018, 9:00 AM), <https://www.forbes.com/sites/forbeshumanresourcescouncil/2018/12/12/proceed-with-caution-unlimited-ptu-may-sound-great-but-could-harm-company-culture/?sh=21dd1ca33a66> [https://perma.cc/4MTJ-P9QX]; Pavithra Mohan, *For Millennials, Unlimited Vacation Isn't Always a Perk*, FAST CO. (Sept. 10, 2019), <https://www.fastcompany.com/90398810/for-millennials-unlimited-vacation-isnt-always-a-perk> [https://perma.cc/UAK4-5UM2].

44. 29 U.S.C. § 2612(a).

45. See Rebecca Gale, *Emergency Paid Leave Helps Some Families, Leaves Others Adrift*, N.Y. TIMES (May 18, 2020), <https://www.nytimes.com/2020/05/18/parenting/coronavirus-family-leave.html?searchResultPosition=1> [https://perma.cc/Z6UR-XNZS]; *America is the only rich country without a law on paid leave for new parents*, ECONOMIST (July 18, 2019), <https://www.economist.com/united-states/2019/07/18/america-is-the-only-rich-country-without-a-law-on-paid-leave-for-new-parents> [https://perma.cc/N334-B33Z].

46. *Paid Family and Sick Leave in the U.S.*, KAISER FAM. FOUND. (Dec. 17, 2021), <https://www.kff.org/womens-health-policy/fact-sheet/paid-family-leave-and-sick-days-in-the-u-s/> [https://perma.cc/3HTX-8ELE].

prioritize a minimalist payroll are unlikely to attract and retain the best talent. Each team will have to find the approach that best serves its needs.

C. Internships and Independent Contractors

The use of interns and independent contractors is a common practice in the sports industry, particularly given its seasonal and competitive nature as discussed above.⁴⁷ Nevertheless, the use of both is often misunderstood and misuse is common. This section seeks to provide some clarity.

An intern is generally understood to be a temporary worker who receives either college credit or minimal or no pay for their work. However, in order for an intern to be unpaid, it must be clear that the intern—and not the employer—is the “primary beneficiary” of the relationship.⁴⁸ Courts use a seven-part test in making this determination:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern’s formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern’s academic commitments by corresponding to the academic calendar.
5. The extent to which the internship’s duration is limited to the period in which the internship provides the intern with beneficial learning.

47. BONNIE TIELL & KELLEY WALTON, HUMAN RESOURCES IN SPORTS: A MANAGERIAL APPROACH 153-154 (2017).

48. *Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act*, U.S. DEP’T OF LAB.: WAGE & HOUR DIV. (Jan. 2018), <https://www.dol.gov/agencies/whd/fact-sheets/71-flsa-internships> [<https://perma.cc/68MH-L95E>].

6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.⁴⁹

If the employer—and not the intern—is determined to be the primary beneficiary under this test, then the intern is considered an employee and entitled to a minimum wage and overtime as discussed above.⁵⁰ Employers that persist in offering unpaid internships consequently run a considerable risk that they might not prevail under this analysis and therefore be subject to the considerable penalties provided for in the FLSA and state analogues.⁵¹ For at least this reason, it is often safer and more advisable to treat interns as part-time, temporary employees and pay them a minimum wage. Paying interns can also help to diversify the organization and provide opportunity to those most deserving, since often times the students or young people capable of taking an unpaid internship come from wealthier backgrounds that provide them the luxury or privilege of foregoing pay.⁵² Additionally, clubs should be mindful that the value of food and housing provided to employees is credited toward an employee's wages.⁵³

Nevertheless, if a club desires to use unpaid internships, there are a few best practices to be mindful of: (1) prioritize students that can receive academic credit for the internship (though students often would prefer not to receive credits since they have to pay for them); (2) the internship should be for a set duration, preferably for a semester or a season; (3) the intern should sign a letter acknowledging that the internship is unpaid, that there is no expectation of employment at the conclusion of the internship, and that the intern is the primary

49. *Id.*

50. *Id.*

51. *See id.*

52. See Trevor Smith, *How Unpaid Internships Reinforce the Racial Wealth Gap*, AM. PROSPECT (Feb. 4, 2019), <https://prospect.org/education/unpaid-internships-reinforce-racial-wealth-gap/> [https://perma.cc/3CMN-UBP4]; Emily Deruy and National Journal, *Are Unpaid Internships Barriers to Success for Some Students of Color?*, ATL. (July 8, 2015), <https://www.theatlantic.com/politics/archive/2015/07/are-unpaid-internships-barriers-to-success-for-some-students-of-color/432255/> [https://perma.cc/B6EV-Z5HH].

53. *Credit Towards Wages Under Section 3(m) Questions and Answers*, U.S. DEP'T OF LAB. WAGE & HOUR DIV., [https://www.dol.gov/agencies/whd/direct-care/credit-wages/faq#:~:text=Section%203\(m\)%20of%20the%20FLSA%20allows%20an%20employer%20to,towards%20wages%20under%20certain%20circumstances](https://www.dol.gov/agencies/whd/direct-care/credit-wages/faq#:~:text=Section%203(m)%20of%20the%20FLSA%20allows%20an%20employer%20to,towards%20wages%20under%20certain%20circumstances) [https://perma.cc/692Q-2LD5] (last visited Apr. 1, 2022).

beneficiary of the internship; (4) the internship should be meaningful to the intern—successful internship programs provide interns the opportunity to see various aspects of the team’s business and to engage with and learn from a variety of team staff; and, (5) the team should not use interns to merely replace who would otherwise be paid workers, *i.e.*, the bulk of the internship should not be spent doing menial and unpleasant work.

In a similar vein, independent contractors are common in the sports industry for specified services, such as graphic design, sponsorship sales, broadcasting, or scouting.⁵⁴ A worker’s status as either an employee or an independent contractor has historical roots in agency law.⁵⁵ Nevertheless, the Department of Labor sets forth its own guidelines on who constitutes an independent contractor for purposes of the FLSA.⁵⁶ On January 7, 2021, the Department of Labor issued a Notice of Proposed Rulemaking, intending to amend the Department’s prior guidance on this issue.⁵⁷ However, immediately upon President Biden’s inauguration, the Department of Labor withdrew the proposed rule, arguing that no court had ever applied the proposed standard and that the rule would weaken protections for employees.⁵⁸ It is unclear at this time whether the Biden administration intends to propose its own rule on the issue. Consequently, in the meantime, there is existing Department of Labor guidance on this issue from 2008.⁵⁹ Citing the Supreme Court, the Department of Labor lists the following factors in evaluating whether someone is an employee or an independent contractor under the FLSA:

1. The extent to which the services rendered are an integral part of the principal’s business.
2. The permanency of the relationship.
3. The amount of the alleged contractor’s investment in facilities and equipment.
4. The nature and degree of control by the principal.
5. The alleged contractor’s opportunities for profit and loss.

54. See TIELL & WALTON, *supra* note 47.

55. *Independent Contractor Status Under the Fair Labor Standards Act*, 86 FED. REG. 14027, 14031 (Mar. 12, 2021), <https://www.federalregister.gov/documents/2021/03/12/2021-05256/independent-contractor-status-under-the-fair-labor-standards-act-withdrawal> [hereinafter *Independent Contractor*].

56. *Fact Sheet 13: Employment Relationship Under the Fair Labor Standards Act (FLSA)*, U.S. DEP’T LAB. WAGE & HOUR DIV. [hereinafter *Fact Sheet 13*], <https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship> [<https://perma.cc/FJ3M-TE5S>] (July 2008).

57. *Independent Contractor*, *supra* note 55, at 14027.

58. *Id.* at 14031-35.

59. *Fact Sheet 13*, *supra* note 56.

6. The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
7. The degree of independent business organization and operation.⁶⁰

Misclassifying an individual as an independent contractor rather than an employee can be a major problem for a team. First and foremost, the team would have failed to withhold and transmit to the state income and various payroll taxes, potentially subjecting the team to penalties.⁶¹ Second, the team may have failed to comply with minimum wage and overtime laws, subjecting them to penalties and action by the should-be-employee as discussed earlier.⁶² And lastly, those same should-be-employees may also find themselves with an unexpected income tax underpayment, subjecting themselves to IRS scrutiny which then may be re-directed at the team.⁶³

As a practical matter, in retaining an independent contractor, generally speaking, the contractor should be performing a specific task, or series of tasks according to their own professional judgment, for a specified period of time, for a specified rate, using their own tools (equipment, software, etc.), and according to their own daily schedule, provided the task or tasks are completed by the deadlines set by the team.⁶⁴ Furthermore, the retention of the independent contractor should be set forth in an agreement making these items and the status of the individual as an independent contractor rather than an employee clear. The contract should explain that the team will not withhold any taxes from the contractor's pay, and that the contractor is responsible for all taxes associated with performance of the services, that the contractor is not entitled to any employment benefits, including but not limited to health insurance and workers' compensation. Such an agreement should also prohibit the contractor from assigning his or her duties under the contract, ensure confidentiality, and dictate that any intellectual property created as a result of the contractor's services shall be owned by the club.

60. *Id.*

61. See *Employer and Employee Responsibilities - Employment Tax Enforcement*, INTERNAL REVENUE SERV., <https://www.irs.gov/compliance/criminal-investigation/employer-and-employee-responsibilities-employment-tax-enforcement> [<https://perma.cc/7NLD-BY8L>] [hereinafter *Employer and Employee Responsibilities*] (last visited Apr. 1, 2022).

62. See *Fact Sheet 13*, *supra* note 56.

63. See *Employer and Employee Responsibilities*, *supra* note 61.

64. See *Fact Sheet 13*, *supra* note 56.

D. Multi-Jurisdictional Operations

Many sports teams operate in multiple jurisdictions. For example, the Washington Football Team has its offices and practice facility in Virginia but plays its home games in Maryland.⁶⁵ The Philadelphia 76ers practice in New Jersey but play in Pennsylvania.⁶⁶ Then of course MLB teams have spring training facilities in Florida or Arizona which are used almost year-round for various purposes.⁶⁷

Generally, teams need to comply with the employment laws of each state in which its employees work, even if the employees are only working there temporarily.⁶⁸ This coverage is broad, including include minimum wage, overtime, health and safety, workers' compensation, leave, discrimination, and tax laws among others.⁶⁹ Employers can try to contract around such laws in individual employment contracts or collective bargaining agreements but it is likely that state courts will not enforce such provisions.⁷⁰ Concerning state income taxes, some states have reciprocity agreements with their adjacent states through which an employee only pays state income taxes in the state in which they live.⁷¹ For example, the District of Columbia, Maryland, and Virginia, comprising a metropolitan area around the District in which people often live and work across jurisdictional lines, have such agreements.⁷² Teams should

65. See *Contact Us*, WASHINGTON FOOTBALL TEAM, <https://www.washingtonfootball.com/about-us/contact-us> [<https://perma.cc/36W9-V33C>] (last visited Apr. 1, 2022) (identifying Ashburn, VA as the team's address); *FedEx Field*, WASHINGTON FOOTBALL TEAM, <https://www.washingtonfootball.com/stadium/> [<https://perma.cc/A3P4-XVDW>] (last visited Apr. 1, 2022) (discussing FedEx Field in Landover, MD as the team's home stadium).

66. See *Sixers unveil new state-of-the-art practice facility in Camden*, NBC SPORTS PHILA. (Sept. 23, 2016), <https://www.nbc.com/sports/philadelphia/philadelphia-76ers/sixers-unveil-new-state-art-practice-facility-camden> [<https://perma.cc/ZB3S-45QS>]; *Arena History*, WELLS FARGO CTR, <https://www.wellsfargo.com/centerphilly/plan-your-visit/arena-history> [<https://perma.cc/MZ7T-KYRV>] (last visited Apr. 1, 2022) (identifying the Wells Fargo Center in Philadelphia as the 76ers' home arena).

67. See *MLB Spring Training Ballparks*, MAJOR LEAGUE BASEBALL, <https://www.mlb.com/spring-training/ballparks> [<https://perma.cc/HSW9-YBRF>] (last visited Apr. 1, 2022).

68. Lisa Nagele-Piazza, *Which State's Wage Laws Apply When Workers Temporarily Relocate?*, SOC'Y FOR HUM. RES. MGMT. (Nov. 28, 2017), <https://www.shrm.org/ResourcesAndTools/legal-and-compliance/state-and-local-updates/Pages/which-state-wage-laws-apply.aspx> [<https://perma.cc/62KU-6A5R>]; Jathan Janove, *The Perils of Multistate Employment*, SOC'Y FOR HUM. RES. MGMT. (May 1, 2012), <https://www.shrm.org/hr-today/news/hr-magazine/pages/0512legal.aspx> [<https://perma.cc/C26J-9PKE>].

69. Nagele-Piazza, *supra* note 68; Janove, *supra* note 68.

70. Nagele-Piazza, *supra* note 68.

71. Janove, *supra* note 68.

72. See *Reciprocity*, VA. TAX, <https://www.tax.virginia.gov/reciprocity> [<https://perma.cc/BL28-YXLF>] (last visited Apr. 1, 2021); *Tax Alert*, COMPTROLLER MD. (May 1, 2020), https://marylandtaxes.gov/covid/documents/superseded/050120_COVID-19_Tax_Alert.pdf.

consult with their payroll processors about any multi-jurisdictional operations and employees to ensure compliance with all applicable laws.

Multi-jurisdictional awareness is even more important in a world shaped by COVID-19, in which remote work is likely to be more common. Once again, employers will still need to comply with all relevant laws when an employee is working from home, including providing a workplace that is free from recognized hazards likely to cause harm under the Occupational Safety & Health Act (OSHA) and its state analogues.⁷³ Moreover, tax laws will once again be implicated by employees now working primarily or exclusively in their home jurisdiction rather than in the jurisdiction of the team's offices.⁷⁴ Teams will therefore need to consult the laws of each relevant jurisdiction to ensure compliance.

E. Dispute Resolution & Employee Separations

Employment in the sports industry can often be characterized as high stakes, high profile, and high turnover. Consequently, there are likely to be disputes with employees. Therefore, it is important that teams take steps to prepare for such separations and potential disputes.

First and foremost, teams should – to the extent consistent with their jurisdiction's laws – require that employment disputes be resolved exclusively through arbitration in a worst-case scenario. The benefits of arbitration are well-known – it is generally faster and cheaper than traditional litigation (with significantly reduced discovery) and can be confidential.⁷⁵ Sports is awash in arbitration agreements – collective bargaining agreements between leagues and unions require player-related disputes⁷⁶ to be arbitrated and league rules often require arbitration of disputes between teams and coaches.⁷⁷

73. See *Work-From-Home Legal Issues Checklist*, AKIN GUMP STRAUSS HAUER & FELD LLP (Mar. 12, 2020), <https://www.akingump.com/en/news-insights/work-from-home-legal-issues-checklist.html>.

74. Stephen Miller, *Out-of-State Remote Work Creates Tax Headaches for Employers*, SOC'Y FOR HUMAN RESOURCE MGMT. (June 16, 2020), <https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/out-of-state-remote-work-creates-tax-headaches.aspx>.

75. See Clifton L. Brinson, *Tips for Maximizing the Benefits of Arbitration*, A.B.A. (Mar. 27, 2017), <https://www.americanbar.org/groups/litigation/committees/commercial-business/practice/2017/tips-for-maximizing-the-benefits-of-arbitration/> [https://perma.cc/J4Y8-HTD8].

76. See, e.g. NFLPA, NFL-NFLPA COLLECTIVE BARGAINING AGREEMENT arts. 15-16, 43-44, 46, 64 (Mar. 15, 2020), <https://nflpaweb.blob.core.windows.net/website/PDFs/CBA/March-15-2020-NFL-NFLPA-Collective-Bargaining-Agreement-Final-Executed-Copy.pdf>.

77. See, e.g., Miki Turner, *New Motion in Mike Petke Lawsuit Aims to Install Don Garber as Arbitrator*, ATHLETIC (Oct. 18, 2019), <https://theathletic.com/1305551/2019/10/18/new-motion-in-mike-petke-lawsuit-aims-to-install-don-garber-as-arbitrator/> [https://perma.cc/DBZ8-QEBL]; Bill Williamson, *Lane Kiffin's Grievance Denied*, ESPN (Nov. 15, 2010), <https://www.espn.com/nfl/news/story?id=5808642>.

Despite the importance of arbitration, it should still be viewed as the last step in a dispute resolution process outlined in the employee handbook. The dispute resolution process should first require the employee to pursue an informal resolution of any complaint by reporting the complaint or concern to the employee's manager, supervisor, or the human resources or legal departments. The policy should describe generally how the team will review and respond to the employee's concern, including a written response from the team within a specified number of days. If the employee is not satisfied with the team's response, then the employee may initiate an arbitration – but only if they have first satisfied these informal procedural requirements.⁷⁸ Indeed, as an additional procedural hurdle, the team may even consider requiring the employee to pursue mediation before filing an arbitration demand.

Importantly, the dispute resolution policy should be crafted as an agreement enforceable against both employee and employer. Whereas in Section I(A), we discussed the importance of the employee handbook generally not being considered an enforceable agreement against an employer, the dispute resolution policy should be its own section within the handbook and given an appropriate title, such as “Dispute Resolution Policy and Agreement.” Furthermore, the handbook signature page should specifically call out that the employee is agreeing to the Dispute Resolution Policy and Agreement. Ultimately, an agreement to arbitrate is a contract and is as enforceable or unenforceable on the same grounds as any other purported contract.⁷⁹

The enforceability of arbitration agreements – particularly contracts considered adhesive like those with employees and consumers – has come under scrutiny in recent years.⁸⁰ California in particular has both statutory and case law that restricts the use of employee arbitration agreements, though a recently

78. See, e.g., *Montgomery v. Solomon Edwards Group LLC*, 2015 WL 5839047, at *8 (Cal. Ct. App. Oct. 7, 2015) (rejecting argument that employee arbitration agreement was unenforceable because it mandated the use of informal resolution processes by the plaintiff prior to binding arbitration); *Kasperzyk v. Shetler Security Servs., Inc.*, 2015 WL 1348503, at *10-11 (N.D. Cal. Mar. 25, 2015) (granting summary judgment for employer against some of employee's claims where employee failed to exhaust “informal methods of resolution” before arbitration).

79. See *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1621 (2018); Scott M. McElhaney, *Enforcing and Avoiding Arbitration Clauses Under Texas Law*, 37 CORP. COUNSELS REV. 109, 119-41 (2018) (discussing the factors relevant to enforcing or avoiding arbitration agreements); Stephen J. Ware, *The Centrist Case for Enforcing Adhesive Arbitration Agreements*, 23 HARV. NEGOT. L. REV. 29, 56 (2017) (discussing contract law defenses against enforcement of arbitration agreements).

80. See Ware, *supra* note 79 at 31-36; Imre S. Szalai, *A New Legal Framework for Employee and Consumer Arbitration Agreements*, 19 CARDOZO J. CONFLICT RESOL. 653, 653-56 (2018).

passed law is the subject of ongoing litigation.⁸¹ Nevertheless, in this environment it is particularly important that employees knowingly enter into the arbitration agreement. For this reason, it should be highlighted and discussed in full during the annual employee handbook discussion sessions.

The dispute resolution policy and agreement may also include other substantive and procedural components of the potential arbitration, including the arbitration provider, number of arbitrators, location of the arbitration, statutes of limitations on claims, and potential discovery procedures or limitations.

Next, confidentiality should be addressed. While arbitration demands are not publicly filed, arbitration is only confidential if the parties agree to it or the arbitrator so orders.⁸² Consequently, the parties should agree to confidentiality in the dispute resolution policy. Nevertheless, the policy should also permit a party to seek interim or provisional relief in court to protect confidential information pending the establishment of the arbitration tribunal. This reflects the practical reality that the fastest way a party can obtain injunctive relief – and stop the spread of potentially damaging confidential information – is still in a courtroom.

Costs are also an important consideration. Both the American Arbitration Association (AAA) and JAMS require employers to pay the costs of the arbitration beyond any initial filing fee paid by the employee.⁸³ These rules are part of an effort to ensure fairness to employees in the arbitration process.⁸⁴ Teams may try to require employees to split the costs of the arbitration in the

81. See *What are the California Rules Regarding Mandatory Arbitration Agreements, and How Do They Differ from Federal Law?*, SOC'Y FOR HUMAN RESOURCE MGMT. (Feb. 3, 2020), [82. See, e.g., *Employment Arbitration Rules and Mediation Procedures*, AM. ARB. ASS'N, 1, 19 \(Oct. 1, 2017\), \[https://www.adr.org/sites/default/files/EmploymentRules_Web_2.pdf\]\(https://www.adr.org/sites/default/files/EmploymentRules_Web_2.pdf\) \(“The arbitrator shall maintain the confidentiality of the arbitration and shall have the authority to make appropriate rulings to safeguard that confidentiality.”\).](https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/californiamandatoryarbitration.aspx#:~:text=The%20California%20Arbitration%20Act%20(CAA,Supreme%20Court%20decision%2C%20Armendariz%20v.&text=Thus%2C%20to%20be%20enforceable%20in,(i.e.%2C%20substantively%20unconscionable)[https://perma.cc/YU3S-47GC]; Chamber of Comm. of U.S. v. Beccera, 438 F.Supp.3d 1078 (E.D. Ca. 2020) (granting business groups injunction against implementation of new California law restricting use of employee arbitration agreements).</p></div><div data-bbox=)

83. See *Employment/Workplace Fee Schedule*, AM. ARB. ASS'N (Nov. 1, 2020), https://www.adr.org/sites/default/files/Employment_Fee_Schedule.pdf [https://perma.cc/S47M-QQC3]; JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness, JAMS (July 15, 2009) [hereinafter *JAMS Policy*], <https://www.jamsadr.com/employment-minimum-standards/> [https://perma.cc/PW2V-WJ8V].

84. See *JAMS Policy*, *supra* note 83.

dispute resolution policy, but it seems unlikely that AAA or JAMs would enforce a provision conflicting with its own rules.

Lastly, the dispute resolution policy should probably include a class action waiver, in which both parties agree that any claims should be brought in an individual capacity and not as a plaintiff or class member in any purported class or collective proceeding. The Supreme Court has specifically ruled that such waivers are enforceable.⁸⁵ Such a waiver would likely be most relevant to a team's part-time employees, the hundreds of hourly paid employees who work on game days and are thus most likely to consider pursuing employment law claims. In considering such waivers though, teams should consider the size of their employee populations and the prospects for any possible class action. Recently established technology firms have created processes by which they can file thousands of individual arbitration claims quite easily.⁸⁶ The respondents in these cases can thus suffer near death by a thousand paper cuts by having to respond to and pay for the costs of each arbitration.⁸⁷ While class action waivers might deter claims and the attorneys that bring them, they will likely also vitiate a consolidated and more efficient defense. Both AAA and JAMS have procedures for handling class actions.⁸⁸

Generally speaking, in drafting a dispute resolution policy and agreement, teams should resist the urge to make the document dramatically one-sided in the team's favor. A more balanced approach is less subject to potential judicial scrutiny. The policy's rules and restrictions should therefore be mutual—equally applicable to the team as to the employee. Additionally, the team may consider permitting the employee to choose the arbitration service, such as JAMS or AAA. Lastly, teams might even consider letting employees bring certain types of claims, such as discrimination or sexual harassment, in court, to prevent the appearance that the team is seeking to silence or cover up such claims. Nevertheless, this comes with the downside of the potentially resultant public scrutiny.

We turn now to involuntary separations which have not reached—and hopefully will not reach—the dispute phase. As stated at the beginning of this Section, the nature of sports results in high employee turnover. Consequently, teams should have a carefully crafted separation agreement ready for use with

85. See *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1621 (2018).

86. See Michael Corkery & Jessica Silver-Greenberg, “Scared to Death” by Arbitration: Companies Drowning in Their Own System, N.Y. TIMES (Apr. 6, 2020), <https://www.nytimes.com/2020/04/06/business/arbitration-overload.html> [<https://perma.cc/C8ME-LT89>].

87. *Id.*

88. See *Class Arbs.*, AM. ARB. ASS'N, <https://www.adr.org/ClassArbitration> [<https://perma.cc/CA94-3FQ8>] (last visited Apr. 1, 2022); *Class Action Procedures*, JAMS (May 1, 2009), <https://www.jamsadr.com/rules-class-action-procedures/> [<https://perma.cc/UE5F-X5DS>].

employees. The separation agreement should serve the main purpose of providing the employee with some amount in severance payment in exchange for that employee's release of all possible claims against the team, and its affiliates, shareholders, and executives. This creates a finality to the employee's employment. As part of the severance agreement, the parties should agree to keep the substance of the agreement (*i.e.*, the amounts or other consideration involved) confidential and not to disparage each other. In this vein, the parties may agree on what the team may or may not say about the employee's employment. The agreement should also require the employee to return any company property and, depending on the employee's role, to be available to answer questions for some period of time. The team may wish to try and lengthen the period of which the severance payments are made in order to ensure the employee's cooperation with the agreement's provisions. Lastly, the agreement should include a merger clause superseding any prior understandings between the parties (such as the employee handbook) and a dispute resolution process (which may or may not match that included in the employee handbook).

When terminating employees, teams should be mindful of wage payment laws. Many jurisdictions require the employee to be paid his or her last paycheck within days of their termination.⁸⁹

Finally, there is a separation item that should be addressed at the hiring stage. Many sports team employees move from some other metropolitan area for their new positions. It is common therefore for teams to pay for or reimburse employees for some or all of the employee's costs of relocating.⁹⁰ In agreeing to make such payments, the teams are clearly investing in these new employees. Consequently, the team will be economically damaged if the employee leaves the team shortly after arriving. It is therefore advised that in an employee's offer letter, to be signed by the employee, the employee agrees that if he or she leaves the team within some specified period of time after arrival, that he or she will reimburse the team for the relocation costs expended by the team. For example, the provision might state as follows:

Employer shall reimburse Employee up to \$10,000 for
Employee's reasonable and documented expenses related to

89. See *Final Paycheck Laws by State*, FINDLAW (July 23, 2019), <https://www.findlaw.com/small-business/employment-law-and-human-resources/final-paycheck-laws-by-state.html#:~:text=Final%20paycheck%20must%20be%20given,No%20law.&text=If%20employee%20is%20laid%20off,15%20days%2C%20whichever%20is%20earlier> [https://perma.cc/H3JS-99UB]; *Last Paycheck*, U.S. DEP'T LAB., <https://www.dol.gov/general/topic/wages/lastpaycheck> [https://perma.cc/ND8C-MA7D] (last visited Apr. 1, 2022).

90. Karyn Mullins, *Are You Ready to Relocate for Work in Sports?*, JOBS SPORTS (Nov. 27, 2017), <https://www.jobssports.com/blog/2017/11/27/ready-relocate-work-sports/>.

relocating to [New City]. In the event that Employee voluntarily resigns from [or is terminated for cause by] Employer within 24 months of Employee's start date, Employee shall reimburse Employer for any relocation costs paid by Employer as follows: 100% if between start date and up to including six months therefrom; 75% if between six months and up to and including one year from start date; 50% if between one year and up to and including 18 months from start date; and, 25% if between 18 months and two years from start date.

Such a provision can help protect employers' investment in new employees and potentially avoid employees who do not wish to make a corresponding career investment.

F. Confidentiality & Social Media

Confidentiality has been mentioned numerous times thus far. It should be obvious that sports teams—like all companies—should take all reasonable steps to protect the confidentiality of their information. This is in part a task for the information technology department, to ensure that best practices for use, dissemination, and storage of the team's electronic information are being followed. At the same time, the legal department must put employees on notice of the broad nature of confidential information and the strict prohibitions against dissemination thereof without the appropriate approvals. Such notice should be included in the employee handbook and, given its importance, be considered an enforceable agreement, in the same way that a dispute resolution policy and agreement might be. Like the dispute resolution policy, a confidentiality agreement should entitle the team to seek injunctive relief to protect its confidential information with the employee acknowledging that the improper use or disclosure of confidential information by the Employee will cause irreparable harm to the team, for which remedies at law will not be adequate (seeking to satisfy some of the elements necessary to receive injunctive relief).⁹¹

There are some sports-specific components to maintaining and enforcing confidentiality. Sports teams are constantly under scrutiny, from fans, media,

91. See Anna Majestro, *Preparing for and Obtaining Preliminary Injunctive Relief*, A.B.A. (June 4, 2018), <https://www.americanbar.org/groups/litigation/committees/woman-advocate/practice/2018/preliminary-injunction-relief/#:~:text=Although%20the%20test%20for%20obtaining,to%20suffer%20irreparable%20harm%20without> [<https://perma.cc/PT93-4FMX>] (listing the standard requirements for obtaining injunctive relief).

and a variety of other commentators and stakeholders.⁹² Controlling its public messaging is thus important for sports teams.⁹³ Indeed, they have entire departments dedicated to the task.⁹⁴ Such careful work however can easily be undone by leaks of confidential information. Employee handbooks should therefore contain policies making clear that: (1) only authorized personnel are permitted to communicate with the media; and, (2) that any unauthorized disclosure of confidential information (to the media or whomever) will be subject to discipline or termination. It is then incumbent on the team to enforce these policies to the extent reasonably possible. Given that tracing the source of leaks is challenging—and that teams should avoid overly intrusive methods of monitoring employees—teams would do well to foster an environment of mutual respect in which employees understand the value of confidential information and have no incentive to disclose it outside the organization. Indeed, employees should understand that the team will struggle to provide employees with sensitive or interesting information if such information quickly makes its way into the media.

Nevertheless, there is a way in which employees may accidentally reveal certain confidential information about which teams should be aware. Understandably, team employees are likely to follow reporters covering the team on social media, most notably Twitter. Reporters, as they do, often tweet rumors about the team. Astute reporters might notice that a large contingent of team employees have—or a specific employee has⁹⁵—liked or otherwise responded to the tweet. In so doing, those employees breathe life into a rumor, potentially reveal confidential information, and undermine the team's efforts to control the narrative. Consequently, team policy should prohibit employees from engaging with media on social media.

Social media generally is an area in which teams must set and enforce policy. While teams should respect employees' personal use of social media, employees must also know that as an employee of a public-facing sports team, their social media posts may generate interest beyond the employee's friends

92. See *Sports PR*, TOP AGENCY, <https://topagency.com/glossary/sports-pr-definition/> (last visited Apr. 4, 2022).

93. *Id.*

94. See *Job Profile: Public Relations*, SPORTS MGMT. DEGREE GUIDE, <https://www.sports-management-degrees.com/job-profiles/public-relations/#:~:text=Public%20relations%20specialists%20in%20the,sports%20teams%20to%20the%20press> (last visited Apr. 4, 2022).

95. See, e.g., Ben Detrick, *The Curious Case of Bryan Colangelo and the Secret Twitter Account*, RINGER (May 29, 2018, 9:08 PM), <https://www.theringer.com/nba/2018/5/29/17406750/bryan-colangelo-philadelphia-76ers-twitter-joel-embiid-anonymous-markelle-fultz> [https://perma.cc/DK76-DSC8] (“[A]dmitted to establishing and operating a handful of anonymous Twitter accounts that were critical of players and other league executives and released sensitive team information.”).

and family. While restricting visibility of social media posts to approved family and friends can help mitigate these concerns, they will not eliminate them. Consequently, teams should advise employees that they are ultimately responsible for posting online and how their conduct might adversely affect the team, and its players, coaches, employees, fans, and business partners. Further, employees should be responsible for ensuring that their posts are consistent with the team's other policies and public positions, which should generally prohibit discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct.

Setting aside the worst-case scenarios, teams must also govern the social media usage of well-intentioned employees. Enthusiastic employees may include the team logo, team imagery or their job title in their social media biography. Such actions can unfortunately cause confusion as to whether the employee's social media account is an official team account. The team therefore should prohibit using team imagery or referencing the employee's status as a team employee in social media. LinkedIn, as a professional-facing social media platform would be an exception. Lastly, to help protect the value of a team's official social media channels, the team should prohibit employees from posting pictures, graphics, videos, or quotes from any non-public organizational event (including team practices, team activities, meetings, and other events) or which have otherwise not been approved for release.

G. Sports Betting

In 2018, the Supreme Court ruled that the Professional and Amateur Sports Protection Act (PASPA), a 1992 federal law prohibiting state-sanctioned sports betting, was unconstitutional.⁹⁶ Since then, states have been rushing to legalize sports betting within their boundaries. As of April 2021, twenty-five states and the District of Columbia have passed some form of legalized sports betting.⁹⁷ Consequently, the professional sports leagues, which defended PASPA in court, have changed tact and are now entering into lucrative partnerships with sports

96. *Murphy v. NCAA*, 138 S.Ct. 1461 (2018).

97. Ryan Rodenberg, *United States of Sports Betting: An Updated Map of Where Every State Stands*, ESPN (Apr. 7, 2021), https://www.espn.com/chalk/story/_/id/19740480/the-united-states-sports-betting-where-all-50-states-stand-legalization [<https://perma.cc/WK4D-LSTM>].

betting operators.⁹⁸ The teams in those leagues too are entering into sponsorship agreements with sports betting operators as their states permit such activity.⁹⁹

These changes have been rapid and have overturned decades of league policy hostile to sports betting.¹⁰⁰ Leagues have historically been concerned that association with sports betting could result in players becoming ingratiated to professional gamblers or organized criminals, causing the players to alter their play, diminish their effort, or intentionally try to lose to benefit the gamblers, harming the integrity of the leagues and games.¹⁰¹ While these concerns are diminished as compared to years past, they still exist. For these reasons, the leagues have adopted rules around teams' partnerships with sports betting operators and the sports betting activities of team employees.¹⁰²

Teams need to be aware of and act upon both league policies concerning sports betting but also relevant legislation. League policies typically prohibit team employees from placing bets on any game in that league.¹⁰³ This helps to prevent team employees from potentially benefiting from information not publicly known about teams or players. Next, depending on the type of sports betting permitted within its borders, each jurisdiction will have its own rules relevant to teams as a result of their sports betting partnerships.¹⁰⁴ For example, in the District of Columbia, the sports betting operator must "employ reasonable methods to prohibit, among other things "[a]n athlete, coach, referee, team

98. See, e.g., *NFL Announces Tri-Exclusive Official Sports Betting Partners*, NFL (Apr. 15, 2021), <https://www.nfl.com/news/nfl-announces-tri-exclusive-sports-betting-partners> [https://perma.cc/7QT9-FHC3] (announcing NFL's partnerships with Caesars, DraftKings, and FanDuel); Daniel Roberts, *Major League Soccer Makes MGM Betting Deal, Following NBA, MLB, NHL*, YAHOO! (Mar. 19, 2019), https://www.yahoo.com/entertainment/major-league-soccer-makes-mgm-betting-deal-following-nba-mlb-nhl-125131648.html?guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LmNvbS8&guce_referrer_sig=AQAAAJm-yBmtUw0KFRbc1rvu1qtPXFamZLbZQv76sQYV12BeG7gxQmGwWmRIQjWjDkcDGSKNGy nfXleQEPM_T03BhpdB8hPnxFn_0IKjo5RV26j3jTaadJ-UuCF4ly-J0qv4pWaTyKdFfUTppzEuHJctBrxUm3yXC17i-a2UsD2LoF [https://perma.cc/CH3T-XGA5].

99. Geoff Fisk, *Sportsbook Brands Have Partnered With US Teams in Every Pro Sport*, BONUS.COM (Oct. 8, 2020), <https://www.bonus.com/sports-teams-betting-partnerships-us/> [https://perma.cc/8PHW-AZA8].

100. See Christopher R. Deubert et al., *Comparing Health-Related Policies & Practice in Sports: The NFL and Other Professional Leagues*, FOOTBALL PLAYERS HEALTH STUDY AT HARV. U. 1, 97 (May 2017), <https://footballplayershealth.harvard.edu/wp-content/uploads/2017/05/Harvard-Comparative-League-Analysis-5.15.17.pdf> [hereinafter *Comparing Health-Related Policies & Practice in Sports*].

101. *Id.*

102. *NFL Launches Comprehensive Responsible Betting Education and Awareness Initiative*, NFL (Oct. 20, 2021, 11:27 AM), <https://www.nfl.com/news/nfl-launches-comprehensive-responsible-betting-education-and-awareness-initiativ>.

103. See, e.g., *Gambling Policy for NFL Personnel*, NFL (2018), <https://nflcommunications.com/Documents/2018%20Policies/2018%20Gambling%20Policy%20-%20FINAL.pdf>.

104. See Rodenberg, *supra* note 97.

owner, employee of a sports governing body or its member teams, and player and referee union personnel from wagering on a sporting event overseen by their sports governing body.”¹⁰⁵ Additionally, “[a]n individual, group of individuals, or entity with access to non-public confidential information held by the operator” is also prohibited from placing wagers with the operator.¹⁰⁶ Lastly, the statute prohibits “[a]n individual, group of individuals, or entity from placing a wager as an agent or proxy for others.”¹⁰⁷

Both league rules and any relevant legislation should be incorporated into a policy which is in the employee handbook and which is reviewed with employees. Moreover, employees should be put on notice that violation of a sports betting policy is likely to result in termination. Harsh sanctions are appropriate given what is at stake. Sports betting scandals have done and can do tremendous harm to the finances and credibility of sports organizations.¹⁰⁸ Additionally, failure to comply with the statute’s requirements could jeopardize the sports betting license and the sports betting partnership and the lucrative revenue streams that come with them.

H. Diversity and Demographics

Creating a positive workplace requires understanding your employee population and its strengths and weaknesses.¹⁰⁹ The sports industry has historically been dominated by males, and even more specifically, cisgender, heterosexual, white males.¹¹⁰ This is true even though the NFL and NBA have

105. D.C. Code. § 36-621.07(b)(1)(B) (2021).

106. D.C. Code. § 36-621.07(b)(1)(C) (2021).

107. D.C. Code. § 36-621.07(b)(1)(D) (2021).

108. See John T. Holden & Marc Edelman, *A Short Treatise on Sports Gambling and the Law: How America Regulates Its Most Lucrative Vice*, 2020 WIS. L. REV. 907, 910-21 (2020) (discussing history of sports betting scandals); Jason Goldstein, *Take the Money Line: PASPA, Bureaucratic Politics, and the Integrity of the Game*, 11 VA. SPORTS & ENT. L.J. 362, 367-74 (2012) (discussing sports betting scandals and policy rationale for prohibitions).

109. See *Thriving in the New Work-Life World*, METLIFE (2019), <https://www.metlife.com/content/dam/metlifecom/us/efts/pdf/MetLife-Employee-Benefit-Trends-Study-2019.pdf> [<https://perma.cc/CW32-73BH>] (reviewing generally the importance of employers understanding and engaging with their employees).

110. See Richard E. Lapchik, *2020 Racial and Gender Report Card*, INST. FOR DIVERSITY & ETHICS SPORTS 1, 1-33 (2020), https://43530132-36e9-4f52-811a-182c7a91933b.filesusr.com/ugd/138a69_bee975e956ad45949456eae2afdc74a2.pdf (collecting data showing the concentration of white males in leadership roles in sports and changes over time); Devon Vincent, *Gender Diversity in the NFL: The Importance of Female Leadership in a Historically Male-Dominated Organization*, 13 WILLAMETTE SPORTS L.J. 60 (2016); Julie Garner, *As an Openly Gay Sports Executive, Rick Welts, '75, is Finally Living His Truth*, UNIV. OF WASH. MAG. (Sept. 2011) <https://magazine.washington.edu/feature/as-an-openly-gay-pro-sports-executive-rick-welts-75-is-finally-living-his-truth/> [<https://perma.cc/B4MA-3QJD>] (“[F]irst executive in major professional sports to declare that he is gay.”).

long had majority-Black player populations.¹¹¹ Research has repeatedly shown the benefits of a diverse workplace¹¹² and many companies around the world are working toward that goal, likely with varying degrees of sincerity and success. Moreover, the importance of equity and inclusion beyond just diversity are also now well-recognized,¹¹³ but those issues are beyond the scope of this article.

The state of the law concerning diverse hiring is complex. “Under the laws enforced by EEOC [the Equal Employment Opportunity Commission], it is illegal to discriminate against someone (applicant or employee) because of that person’s race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information.”¹¹⁴ Nevertheless, the Supreme Court has recognized exceptions to these strict prohibitions. First, in 1979, in *United Steelworkers of America, Inc., AFL-CIO-CLC v. Weber*, the Court held that “an affirmative action plan—collectively bargained by an employer and a union—that reserves for black employees 50% of the openings in an in-plant craft-training program until the

111. See Richard E. Lapchik, *2020 Racial and Gender Report Card—National Football League*, INST. FOR DIVERSITY & ETHICS SPORTS 1, 8 (2020), https://43530132-36e9-4f52-811a-182c7a91933b.filesusr.com/ugd/326b62_b84c731ad8dc4e62ba330772b283c9e3.pdf; Richard E. Lapchik, *2020 Racial and Gender Report Card—National Basketball Association*, INST. FOR DIVERSITY & ETHICS SPORTS 1, 9 (2020), https://43530132-36e9-4f52-811a-182c7a91933b.filesusr.com/ugd/7d86e5_9ed7a1185cc8499196117ce9a2c0d050.pdf.

112. See *Diversity Wins: How Inclusion Matters*, MCKINSEY & CO. 1, 3-4 (May 2020), <https://www.mckinsey.com/~/media/McKinsey/Featured%20Insights/Diversity%20and%20Inclusion/Diversity%20wins%20How%20inclusion%20matters/Diversity-wins-How-inclusion-matters-vF.pdf> (“[C]ompanies in the top quartile of gender diversity on executive teams were 25 percent more likely to experience above-average profitability than peer companies in the fourth quartile” and that “[i]n the case of ethnic and cultural diversity, the findings are equally compelling. We found that companies in the top quartile outperformed those in the fourth by 36 percent in terms of profitability in 2019, slightly up from 33 percent in 2017 and 35 percent in 2014.”); Rocío Lorenzo et al., *How Diverse Leadership Teams Boost Innovation*, BOS. CONSULTING GRP. (Jan. 23, 2018), <https://www.bcg.com/en-us/publications/2018/how-diverse-leadership-teams-boost-innovation> [<https://perma.cc/GRP7-8HRY>] (“Companies that reported above-average diversity on their management teams also reported innovation revenue that was 19 percentage points higher than that of companies with below-average leadership diversity”); Vijay Eswaran, *The Business Case for Diversity in the Workplace Is Now Overwhelming*, WORLD ECON. F. (Apr. 29, 2019), <https://www.weforum.org/agenda/2019/04/business-case-for-diversity-in-the-workplace/> [<https://perma.cc/8Z9Y-PB8B>] (discussing economic and non-economic benefits to diversity in the workplace).

113. See Mursal Hedayat, *Diversity Is Not Enough*, FORBES (June 30, 2020, 6:29 PM), <https://www.forbes.com/sites/mursalhedayat/2020/06/30/diversity-is-not-enough/?sh=3cb6a30c786e>; KENNETH L. SHROPSHIRE, *SPORT MATTERS: LEADERSHIP, POWER, & THE QUEST FOR RESPECT IN SPORTS* 1, 16-18, 91-93 (2014).

114. *Prohibited Employment Policies/Practices*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/prohibited-employment-policiespractices> [<https://perma.cc/QZ9H-EHTL>] (last visited Apr. 1, 2022).

percentage of black craft-workers in the plant is commensurate with the percentage of blacks in the local labor force” did not violate Title VII.¹¹⁵ Citing the law’s intent to remedy “racial injustice,” the Court indicated that such plans are permissible when (1) preferences are intended to “eliminate manifest racial imbalance in traditionally segregated job categories;” (2) the rights of nonminority employees are “not unnecessarily trammled;” and (3) the preferences are temporary in duration.¹¹⁶ In 1987, the Supreme Court similarly held that a California agency had not violated Title VII when, as part of “an affirmative action plan that represent[ed] a moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the Agency’s work force,” it “took into account as one factor the sex of [an employee] in determining that she should be promoted.”¹¹⁷ “In evaluating the compliance of an affirmative action plan with Title VII’s prohibition on discrimination,” the Court stressed the important of being “mindful of ‘this Court’s and Congress’ consistent emphasis on ‘the value of voluntary efforts to further the objectives of the law.’”¹¹⁸

Since those seminal Supreme Court opinions, the Court has revisited diversity in the academic setting, but not the workplace. On multiple occasions, the Court has upheld colleges’ admission programs’ inclusion of “race as one factor among many” as part of efforts to enroll a diverse student body.¹¹⁹ Scholars have subsequently debated the potential application of the Supreme Court’s decisions in these cases to the employment context.¹²⁰

In the absence of a case merging these areas of law, the strictures of *Weber* are the best understanding of the degree to which an individual’s protected status (race, color, ethnicity, gender, sex, sexual orientation, gender identity, and

115. *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 197 (1979).

116. *Id.* at 208-209.

117. *Johnson v. Transp. Agency*, 480 U.S. 616, 641-42 (1987).

118. *Id.* at 640 (first quoting *Wygant v. Jackson Board of Ed.*, 476 U.S. 267, 290 (1986) (O’Connor, J., concurring in part and concurring in judgment); and then quoting *Regents of Cal. v. Bakke*, 438 U.S. 265, 364 (1978)).

119. *Grutter v. Bollinger*, 539 U.S. 306, 340 (2003); see also *Fisher v. Univ. of Tex. at Austin*, 136 S.Ct. 2198 (2016) (upholding college’s admission process which evaluated numerous factors, including race).

120. See Stacy Hawkins, *What the Supreme Court’s Diversity Doctrine Means for Workplace Diversity Efforts*, 33 A.B.A. J. LAB. & EMP. L. 139 (2018) [hereinafter *What the Supreme Court’s Diversity Doctrine Means*]; Stacy Hawkins, *How Diversity Can Redeem the McDonnell Douglas Standard: Mounting an Effective Title VII Defense of the Commitment to Diversity in the Legal Profession*, 83 FORDHAM L. REV. 2457 (2015) [hereinafter *How Diversity Can Redeem the McDonnell Douglas Standard*]; Monique C. Lillard et al., *The Effect of the University of Michigan Cases on Affirmative Action in Employment: Proceedings of the 2004 Annual Meeting, Association of American Law Schools, Section on Employment Discrimination Law, Labor Relations and Employment Law, and Minority Groups*, 8 EMP. RTS. & EMP. POL’Y J. 127 (2004).

pregnancy) can be taken into account in making employment decisions.¹²¹ Nevertheless, proving that the employer's affirmative action plan (AAP) meets the *Weber* criteria is a high burden and employers have more often than not lost lawsuits challenging such plans.¹²²

Employers seeking to diversify their workplaces have a better option than the creation of an AAP. Employers should not make decisions based solely on an individual's protected status. Instead, "race-conscious diversity efforts—such as targeted or expanded recruitment, or mere diversity goals—"should be coupled with addressing "legitimate business concerns."¹²³ As explained by Professor Stacy Hawkins, an expert in this area:

an employer is much more likely to prevail in a reverse discrimination case when the employer is ... able to demonstrate that, notwithstanding an interest in improving workplace diversity, the challenged employment action can be defended on the basis of some legitimate, nondiscriminatory business reason unconnected to the candidate's race, ethnicity, and/or gender.¹²⁴

Employers should strongly consider adopting diversity initiatives within their workplaces. Research has demonstrated employers have been successful in their diversity efforts by establishing recruiting, training and mentoring programs for diverse communities and individuals, and by assigning someone within the organization the responsibility of managing diversity.¹²⁵ More specifically, perhaps the legally safest and smartest approach to increasing diversity in the workforce is for employers to ensure that they are generating interest from and interviewing a diverse set of candidates, akin to the NFL's Rooney Rule.¹²⁶ To simplify an otherwise complex concept, from such a pool of candidates, employers' selection of the most-qualified candidate should result in a more diverse workplace.

While affirmative diversity initiatives might draw legal scrutiny, of course so might the failure of employers to provide a workplace free of discrimination

121. *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979).

122. *What the Supreme Court's Diversity Doctrine Means*, *supra* note 120, at 154; *How Diversity Can Redeem the McDonnell Douglas Standard*, *supra* note 120, at 2471-72.

123. *What the Supreme Court's Diversity Doctrine Means*, *supra* note 120, at 155.

124. *How Diversity Can Redeem the McDonnell Douglas Standard*, *supra* note 120, at 2472.

125. Soohan Kim et al., *Progressive Corporations at Work: The Case for Diversity Programs*, 36 N.Y.U. REV. L. & SOC. CHANGE 171, 204-09 (2012).

126. *See How Diversity Can Redeem the McDonnell Douglas Standard* *supra* note 120, at 2479-81.

or harassment based on an employee's protected status. As described by the EEOC:

[h]arassment is unwelcome conduct that is based on race, color, religion, sex (including sexual orientation, gender identity, or pregnancy), national origin, older age (beginning at age 40), disability or genetic information (including family medical history). Harassment becomes unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive."¹²⁷

Moreover, "[a]nti-discrimination laws also prohibit harassment against individuals in retaliation for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or lawsuit under these laws; or opposing employment practices that they reasonably believe discriminate against individuals, in violation of these laws."¹²⁸

Obviously, teams should have, instill, and enforce policies against harassment. It is also of course increasingly common and generally recommended for employers to conduct trainings with their staff about such policies (indeed, California requires it).¹²⁹ A key component of the effectiveness of such policies is the creation of a legitimate reporting mechanism. Employees should be encouraged to report any concerns they have to the human resources or legal departments. Alternatively, if they feel more comfortable, reporting to managers or supervisors is also appropriate, provided that those individuals understand that they have an obligation to report the allegations to the human resources or legal departments. It is incumbent upon organizations to ensure that managers and supervisors have the necessary training and/or skills to receive and handle allegations of harassment. Lastly, teams are encouraged to create a "hotline," an online platform through which employees can anonymously report employment concerns of any kind and

127. *Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/harassment> ([<https://perma.cc/8YQL-NQQ5>] (last visited Apr. 1, 2022)).

128. *Id.*

129. Cal. Gov't. Code § 12950.1 (2021).

which are routed to human resources and legal for resolution. There are various vendors that provide such a service for minimal cost.¹³⁰

The manner in which allegations are handled is clearly an important part of anti-harassment policies. Sports teams are private—rather than public—entities and therefore are not required to provide procedural due process to an employee accused of wrongdoing.¹³¹ In other words, employers can consider any allegations of harassment presumptively true and effectively require the accused to disprove them. It is recommended that employers swiftly conduct a comprehensive investigation (potentially using outside counsel), including interviewing all individuals with relevant information.

Nevertheless, in many instances of alleged harassment, the only witnesses will be the accuser and the accused. Against this backdrop, it is important to remember that according to an EEOC report, approximately 70% of women who experienced sexual harassment in the workplace did not report it.¹³² Moreover, there is a well-recognized problem in which victims who do report sexual harassment are not believed.¹³³ Failing to take action against an alleged harasser may subject an employer to claims of negligent retention if the individual is accused again at a later date.¹³⁴ Consequently, from both a legal, moral, and organizational cultural perspective, it is recommended to err on the side of believing the accuser's version of events and taking appropriate disciplinary action against the accused.

Unfortunately, these issues have considerable relevance in the sports industry. In recent years, numerous teams have been alleged or found to have fostered environments in which sexual and/or racial harassment was accepted

130. See, e.g., *Employee Ethics Hotlines*, SHORTLISTER, <https://www.myshortlister.com/employee-ethics-hotline/vendor-list> (last visited Apr. 5, 2022).

131. See *Rodgers v. Maco Mgmt. Co.*, 218 F. App'x 557, 558-59 (8th Cir. 2007); *Fennell v. AARP*, 770 F.Supp.2d 118, 132 (D.D.C. 2011); *Drake v. Delta Air Lines, Inc.*, 1997 WL 397498, *3-4 (E.D.N.Y. 1997).

132. *Select Task Force on the Study of Harassment in the Workplace*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (June 2016), https://www.eeoc.gov/select-task-force-study-harassment-workplace#_ftnref126 [<https://perma.cc/5K7H-7GVC>].

133. See Jin X. Goh et al., *Narrow Prototypes and Neglected Victims: Understanding Perceptions of Sexual Harassment*, J. PERSONALITY & SOC. PSYCH.: INTERPERSONAL RELS. & GRP. PROCESSES 3, 12-15 (2021); Clyde Haberman, *Do We Believe Women Yet? The Battle to End Sexual Harassment*, N.Y. TIMES (Oct. 17, 2017), <https://www.nytimes.com/2017/10/17/us/retro-sexual-harassment.html> [<https://perma.cc/7GC2-VJWM>].

134. See generally *CSX Transp., Inc. v. Smith*, 229 W. Va. 316 (2012) (affirming jury award in favor of employee where employer was found liable for, among other things, negligently retaining employee that sexually harassed plaintiff). See also *Hays v. Patton-Tully Transp. Co.*, 844 F. Supp. 1221, 1223 (W.D. Tenn. 1993) (collecting cases recognizing negligent retention claims where employers retain employee accused of sexual harassment).

or even thrived.¹³⁵ As a result, the sports industry has too often been an unwelcoming work environment to women, persons of color, and LGBTQ persons.¹³⁶ This is obviously bad in numerous respects—it is contrary to American values and often law. Moreover, research has shown that business teams made up of homogenous individuals make worse decisions.¹³⁷ Consequently, sports teams need to be conscientious and diligent in not only complying with the law, but in creating and promoting a diverse and equitable workplace in which everyone feels welcome and valued.

Other than diversity, sports teams often have another demographical consideration—their staffs are often populated with young people, recently out of college. This fact has plusses and minuses. Younger employees are likely to be paid less but still have high energy and enthusiasm for their jobs. On the other hand, they will lack meaningful professional experience and knowledge. For these reasons, it is recommended that teams regularly conduct or host trainings or talks on a wide range of subjects. While sessions related to sports industry topics and skills are of course important, talks on any other number of academic or real-world issues will help to broaden their perspective and knowledge. One possible source of fun and informative talks is local professors. A team could arrange lunch for twenty to twenty-five employees during which a professor provides a thirty to forty-five minute talk on some hopefully

135. See, e.g., Katie Strang & Brittany Ghiroli, *'I've Barely Hit on You': Inside a Mets Culture Rotten Beyond Mickey Callaway and Jared Porter*, ATHLETIC (Apr. 16, 2021), https://theathletic.com/2519652/2021/04/16/live-barely-hit-on-you-inside-a-mets-culture-rotten-beyond-mickey-callaway-and-jared-porter/?article_source=search&search_query=%20mets [<https://perma.cc/EBU6-Y9N3>]; Will Hobson et al., *Lewd Cheerleader Videos, Sexist Rules: Ex-employees Decry Washington's NFL Team Workplace*, WASH. POST (Aug. 26, 2020), <https://www.washingtonpost.com/sports/2020/08/26/redskins-cheerleaders-video-daniel-snyder-washington/> [<https://perma.cc/7BCF-YLK6>]; Victor Mather & Ken Belson, *Without Disclosing Details, N.F.L. Fines Jerry Richardson for Sexual Harassment and Racist Comments*, N.Y. TIMES (June 28, 2018), <https://www.nytimes.com/2018/06/28/sports/football/jerry-richardson-nfl-panthers.html> [<https://perma.cc/B5TS-CPDS>].

136. See Joon Lee, *Don't Be Fooled by Kim Ng's Hiring. Women in Baseball Say MLB Has a Long Way to Go*, ESPN (Apr. 22, 2021), https://www.espn.com/mlb/story/_/id/31164867/fooled-kim-ng-hiring-women-baseball-say-mlb-long-way-go [<https://perma.cc/4T9Z-BRPS>]; Erik Denison et al., *Reviewing Evidence of LGBTQ+ Discrimination and Exclusion in Sport*, 24 SPORT MGMT. REV. 389 (2020); Elizabeth Sepper & Deborah Dinner, *Sex in Public*, 129 YALE L.J. 78, 96 (2019); Alana Schetzer, *Unwelcome, Unsafe: Teams for Those Left on the Sideline*, GUARDIAN (Oct. 8, 2018), <https://www.theguardian.com/world/2018/oct/09/creating-communities-challenging-sport-as-a-domain-for-inclusion> [<https://perma.cc/28NS-SEXU>]; Michael A. Fletcher, *'Dear Black Athlete' Examines Issues of Race and Sports in this Moment of Protest*, UNDEFEATED (Feb. 11, 2018), <https://theundefeated.com/features/dear-black-athlete-issues-of-race-sports-birmingham/> [<https://perma.cc/2MA4-WC7B>]; Lisa A. Mазzie, *Michael Sam and the NFL Locker Room: How Masculinities Theory Explains the Way We View Gay Athletes*, 25 MARQ. SPORTS L. REV. 129, 132-49 (2014).

137. Evan Apfelbaum, interviewed by Martha E. Mangelsdorf, *The Trouble with Homogeneous Teams*, MIT SLOAN MGMT. REV. (Dec. 11, 2017), <https://sloanreview.mit.edu/article/the-trouble-with-homogeneous-teams/> [<https://perma.cc/3UM6-S6Z5>].

interesting topic. In exchange, the team can offer the professor tickets to a game or some other reciprocal exchange. It is a win-win.

I. Miscellaneous

Above, we have covered a variety of important and comprehensive employment matters with which sports teams must contend. This Section will cover a few other more discrete items.

First, teams, as part of an employee handbook, should prohibit employees from selling tickets, merchandise or other materials or benefits provided by the team. Such items are often a valuable perquisite of working for a sports team but it is unseemly for employees to then profit from that role. Selling tickets can be particularly problematic as it may interfere with or distort the ticket department's efforts and may even violate the team's agreement with Ticketmaster or other vendor.

Second, teams should either prohibit or strictly limit fraternization between players and staff members. Many staff members will of course interact with the players but such interactions should always be professional and limited to that which is necessary for business, except perhaps the occasional team function. In particular, romantic relationships between staff and players or coaches have the potential to create problems in the workplace or draw unwanted public attention.

Third, in crafting an employee handbook, teams should give thought to policies around volunteer work. Professional sports teams are rightly considered and recognized as important members of the communities in which they play.¹³⁸ Consequently, teams generally have various charitable partners whose work they support in a variety of ways.¹³⁹ A team's employees should be a part of this good work also. Research has shown that incorporating volunteer work into employees' work increases employee satisfaction and strengthens their relationship to their employer.¹⁴⁰ Teams can arrange for volunteer activities, but they should also consider providing employees a certain

138. *Community Relations in Sport: An Area to Explore?*, SPORT MGMT. HUB (May, 16, 2019), <https://sportmanagementhub.com/community-relations-in-sport/>.

139. *See, e.g., id*

140. *See 2017 Deloitte Volunteerism Study*, DELOITTE (June 2017), <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/about-deloitte/us-2017-deloitte-volunteerism-survey.pdf>; Wes Gay, *4 Reasons Why a Corporate Volunteer Program a Smart Investment*, FORBES (Nov. 3, 2016), <https://www.forbes.com/sites/wesgay/2016/11/03/4-reasons-why-a-corporate-volunteer-program-is-a-smart-investment/> [<https://perma.cc/2W8C-JVKQ>]; Matt Weeks, *UGA Study Finds Volunteering Increases Workers' Job Performance*, UGA TODAY (Feb. 3, 2014), <https://news.uga.edu/uga-study-finds-volunteering-increases-workers-job-performance/> [<https://perma.cc/3BDW-FCFX>].

number of days or hours per year in which they can engage in pre-approved self-organized volunteer activity.

II. TEAM STAFF CONSIDERATIONS

Having examined labor and employment issues most relevant to sports teams' business staff, in this Part II we examine labor and employment issues teams are likely to face with their team staffs, *i.e.*, the players, coaches, and support staff. These individuals obviously operate in a very specialized and unique environment—elite sports competition. Moreover, they are, for the most part, highly paid and high profile. Consequently, their positions raise important labor and employment issues. This Part will discuss labor and employment law in the context of unionization and collective bargaining agreements, employment agreements, minor league athletes, joint employment relationships, and youth sports.

A. *Unionized Players, Collective Bargaining Agreements, and Team Rules*

Collective bargaining agreements (CBAs) are the core legal structure of professional sports.¹⁴¹ The players in all of the major professional sports leagues (NFL, MLB, NBA, NHL, MLS, WNBA) and in an increasing number of minor leagues (NWSL, United Soccer League (USL), G League, AHL, ECHL) are represented by unions.¹⁴² Pursuant to the National Labor Relations Act, these unions are “the exclusive representatives of all the employees in [the bargaining] unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.”¹⁴³ The unions then negotiate comprehensive CBAs with the leagues that cover a wide range of matters, including but not limited to salaries and other compensation, contract structures, drafts, free agency, salary caps, practice schedules, dispute resolution, benefits, and much more.¹⁴⁴

141. *Collective Bargaining Agreements in Sports Leagues*, JUSTIA, <https://www.justia.com/sports-law/collective-bargaining-agreements-in-sports-leagues/> (last visited Apr. 4, 2022).

142. See *Labor Relations and the Sports Industry: Sports Unions + Leagues*, RUTGERS U. LIBRS., <https://libguides.rutgers.edu/c.php?g=336678&p=2267003> (last visited Apr. 4, 2022); Jeff Carlisle, *NWSL Players Association Announces NWSL Agreement Over List of Demands*, ESPN (Oct. 29, 2021), <https://www.espn.com/soccer/united-states-nwsl/story/4508769/nwsl-players-association-announces-nwsl-agreement-over-list-of-demands>; USL PLAYER'S ASS'N., <https://uslplayers.org/> (last visited Apr. 4, 2022); *G League Players Unionize with Assist from the NBPA*, NAT'L BASKETBALL PLAYERS ASS'N. (July 20, 2020), <https://nbpa.com/news/g-league-players-unionize-with-assist-from-the-nbpa>; *About the PHPA*, PRO. HOCKEY PLAYERS' ASS'N., <https://phpa.com/site/about> (last visited Apr. 1, 2022).

143. 29 U.S.C. § 159(a).

144. See, e.g., NFL-NFLPA COLLECTIVE BARGAINING AGREEMENT, *supra* note 65, at i-xv.

The CBAs effectively resolve how teams can and should handle numerous (most) areas of labor and employment law.¹⁴⁵ The CBA is a team's first consideration in any player-related matters and teams therefore spend considerable time seeking to understand and ensure compliance with the CBA.¹⁴⁶

Nevertheless, the CBA does not encompass the entirety of a team's relationship with its players. Importantly, CBAs, despite their imprimatur under federal labor law, cannot contradict state statutes.¹⁴⁷ Consequently, teams must be mindful of their jurisdiction's laws and their potential application to their players. One area of historical concern at the state law level has been workers' compensation statutes. Some states (such as Florida) do not require workers' compensation protections while others (such as California) have historically offered generous benefits to athletes.¹⁴⁸ In particular, teams should consider as an addendum to a player's standard contract specifying which state's laws they wish to govern a player's workers' compensation claim.¹⁴⁹

Next, CBAs generally do not foreclose teams from setting their own rules or policies on issues not addressed in the CBA, though the CBA might set some parameters, such as the maximum discipline that can be imposed.¹⁵⁰ Coaches of course generally implement their own rules and expectations for player behavior, which again must be within the confines of the CBA.¹⁵¹ From a

145. See Gabe Feldman, *Collective Bargaining in Professional Sports: The Duel Between Players and Owners and Labor Law and Antitrust Law*, in *THE OXFORD HANDBOOK OF AMERICAN SPORTS LAW* (Michael A. McCann ed., 2018).

146. See *What is a Collective Bargaining Agreement?*, SOC'Y FOR HUM. RES. MGMT., <https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/collectivebargainingagreement.aspx> (last visited Apr. 1, 2022).

147. See *Williams v. Nat'l Football League*, 582 F.3d 863 (8th Cir. 2009) (holding that CBA did not preempt claims brought pursuant to Minnesota statutes), *cert. denied*, 562 U.S. 1029 (2010).

148. See Christopher R. Deubert et al., *Protecting and Promoting the Health of NFL Players: Legal and Ethical Analysis and Recommendations*, 7 HARV. J. SPORTS & ENT. L. 1, 257-60 (2016) [hereinafter *Protecting and Promoting the Health of NFL Players*] (discussing history and nature of workers' compensation in the NFL); *Comparing Health-Related Policies & Practices in Sports*, *supra* note 100, at 109, 115, 119, 121, 123, 125 (summarizing workers' compensation in different sports leagues).

149. See *Matthews v. Nat'l Football League*, 688 F.3d 1107 (9th Cir. 2012) (enforcing provision in contract requiring workers' compensation claims to be adjudicated under Tennessee law).

150. See, e.g., NFL-NFLPA COLLECTIVE BARGAINING AGREEMENT, *supra* note 76 at art. 42 (discussing Club Discipline).

151. See Bill Pennington, *Tom Coughlin Undone by Huge Fines, and the Calendar*, N.Y. TIMES (Dec. 23, 2019), <https://www.nytimes.com/2019/12/19/sports/coughlin-jaguars-giants.html> [<https://perma.cc/D6WD-9ZAK>] (discussing long-time NFL head coach Tom Coughlin's strict rules); Bob Brookover, *Joe Girardi's Rules as Phillies Manager May be Unwritten but they Will be Real*, PHILA. INQUIRER (Oct. 28, 2019), <https://www.inquirer.com/phillies/joe-girardi-phillies-manager-rules-gabe-kapler-20191029.html>

business-side perspective, perhaps the most important rules that clubs can seek to impose on their players are those concerning harassment. Unfortunately, there have been situations in which players have been found to have harassed team employees, particularly female employees.¹⁵² Regardless of their status as famous athletes, players need to comply with the law and treat other team personnel professionally and respectfully. Consequently, in consultation with the league as necessary, teams should advise players of their anti-harassment policies and provide appropriate training to them, in a similar manner as teams often do with their business staffs.

B. Employment Agreements

Most team staff have an employment agreement. Players and teams of course use the standard player contract agreed to between the league and union as the base for a player's contract.¹⁵³ Yet, beyond the players, team contract with their coaches and often other team staff, such as general managers, personnel assistants, strength and conditioning coaches, athletic trainers, equipment managers, and scouts. Written agreements provide both sides with some degree of certainty in the competitive sports landscape.

Beyond salary, bonuses, term, and boilerplate language, there are a variety of items teams should consider including in staff contracts.

First, the contract should identify the individual's title, duties, and to whom the individual reports. For certain staff, the team may desire the ability to re-assign the employee which can either be explicitly included or more subtly, such as: "Employee shall perform such duties as are customary for an assistant coach and such other duties as directed by Team." Relatedly, the contract should require the employee to participate in the team's media, marketing and public relations efforts and otherwise preclude or limit an employee's other professional activities.

Second, the contract must require the employee to comply with league rules and put the employee on notice that failure to comply with league rules may subject the employee to discipline. The leagues typically have preferred language on these issues, including that all disputes between the team and a

[<https://perma.cc/U55F-FGL9>] (discussing rules to be instituted by new Philadelphia Phillies manager Joe Girardi).

152. See Jeff Carlisle, *NYCFC Reports "Unacceptable" Behavior After Investigation Into Sexual Harassment Allegations*, ESPN (Nov. 6, 2020), <https://www.espn.com/soccer/new-york-city-fc/story/4227808/nycfc-reports-unacceptable-behavior-after-investigation-into-sexual-harassment-allegations> [<https://perma.cc/BS46-5ZLY>].

153. Feldman, *supra* note 145.

coach shall be decided by an arbitration presided over by the Commissioner or the Commissioner's designee.¹⁵⁴

Third, the agreement should require the employee to comply with all team rules and policies, as may be amended from time-to-time. Moreover, it is recommended that the agreement specifically incorporate by reference the team's employee handbook. Coaches are not unionized and thus teams can set the terms and conditions of employment and should seek to place them on as equal a footing as possible with the business side employees.

Fourth, teams should seek broad rights to terminate the contract for cause, without any further financial obligations on behalf of the team. A sample provision of termination for cause reads:

Termination shall be deemed to be with "Cause" if Employee is charged with any felony, commits any material act of dishonesty, intentionally discloses confidential information, is guilty of gross carelessness or misconduct, any indecent act or act involving moral turpitude, unjustifiably fails or refuses to perform or neglects Employee's duties or any material condition imposed upon Employee under this Agreement, or acts in any way that has a direct, substantial and adverse effect on Team's reputation.

Fifth, the team should also take steps to protect itself in those situations in which it terminates the contract without cause, such as based on poor performance. Specifically, the team should seek to include offset language in the agreement, requiring: (i) that the employee actively seek reasonable employment in the sports industry; (ii) that any amounts employee receives from new employment shall reduce any amounts still owed by team; and, (iii) that the employee shall disclose such information as the team reasonably requests to establish the employee's compliance with (i) and (ii). Such a provision imposes on the employee an obligation to mitigate any damages arising out of the team's termination of the contract and also to negotiate and receive a fair level of compensation for the employee's services and not structure any employment agreement so as to disproportionately limit the offset.

154. See Rachel Reed, *Brian Flores vs. the NFL*, Harv. L. Today (Fed. 9, 2022), <https://today.law.harvard.edu/brian-flores-vs-the-nfl/>.

Sixth, the agreement should permit the team, league, and such others as they may designate to utilize the employee's name, image, and likeness for publicity and promotional purposes without further compensation and in perpetuity. In recent years, there has been considerable legal attention paid to athletes' rights of publicity.¹⁵⁵ Coaches, like athletes, are often well-known public figures and thus, there is economic value in their rights of publicity.¹⁵⁶ Teams should seek to control as much of these rights as possible.

Seventh, the agreement should contemplate events of force majeure, including but not limited to work stoppages. Such language is more important than ever in light of the COVID-19 pandemic.¹⁵⁷ Teams should seek the ability to adjust or reduce the employee's pay in the event there is a strike, lockout or some other event which interferes with the employee's duties. The exact triggering mechanism—such as number of games cancelled—will likely be a subject of negotiation.

Finally, an adjacent legal concept that teams should consider with regard to team support staff is taxation. Many states have what are referred to as “jock taxes,” which generally require athletes to pay state income tax on income earned while playing in another state.¹⁵⁸ For example, as a result of the New York Yankees playing a series in Oakland against the Athletics, Yankees' outfielder Aaron Judge will owe California taxes. The calculations on the amounts owed vary by state but are usually based either on the number of games played or days spent in the visiting state.¹⁵⁹ Importantly, these laws generally apply to coaches and other team support staff,¹⁶⁰ though individual state laws should be reviewed to ascertain the scope of applicability. From a team perspective, the team must ensure it is withholding and delivering the

155. See *In re* NCAA Student-Athlete Name & Likeness Licensing Litigation, 724 F.3d 1268 (9th Cir. 2013) (affirming holding that former college athletes stated viable claims against video game maker and NCAA for unauthorized use of name, image, and likeness).

156. See Robert H. Lattinville & Robert A. Boland, *Coaching in the National Football League: A Market Survey and Legal Review*, 17 MARQ. SPORTS L. REV. 109, 153 (2006) (discussing rights of publicity provisions in NFL coaching contracts).

157. See Paula M. Bagger, *The Importance of Force Majeure Clauses in the COVID-19 Era*, A.B.A. (Mar. 25, 2021), <https://www.americanbar.org/groups/litigation/committees/commercial-business/boilerplate-contracts/force-majeure-clauses-contracts-covid-19/> [<https://perma.cc/FMA4-YFKJ>].

158. See Addison Fontein, *The Home Team Advantage: Why Lawmakers and the Judiciary Should Bench the Jock Tax*, 7 ARIZ. ST. SPORTS & ENT. L.J. 327, 327 (2018); Elizabeth C. Ekmekjian, *The Jock Tax: State and Local Income Taxation of Professional Athletes*, 4 SETON HALL J. SPORT L. 229, 230, 233 (1994).

159. Fontein, *supra* note 158, at 337-38 (citing Ekmekjian, *supra* note 158, at 238).

160. Fontein, *supra* note 158, at 328.

appropriate amounts to each state with such a tax.¹⁶¹ Leagues are generally aware of this issue and can provide further guidance.

C. Minor League Athletes

Many teams employ or otherwise control the rights to athletes playing in minor leagues.¹⁶² The teams may employ these players directly or they may be employed by entity under common control as the team or a separate entity that nonetheless has an affiliation agreement with the team.¹⁶³ The team's employment law obligations will be governed by the specific relationship. Moreover, most minor league athletes are not unionized and thus employers have greater flexibility in these relationships.¹⁶⁴ There are nonetheless a few issues worth highlighting concerning minor league athletes.

First, most minor league athletes are not well paid, creating potential concerns about minimum wage and overtime compliance under the FLSA and state laws.¹⁶⁵ Indeed, there is a pending class action lawsuit by current and former minor league baseball players against MLB on these issues.¹⁶⁶ In response to the lawsuit, brought in 2014, MLB successfully lobbied Congress for the "Save America's Pastime Act."¹⁶⁷ This law generally exempts minor league baseball players from the FLSA's protections.¹⁶⁸ Importantly, the law only applies prospectively and thus does not affect the pending litigation.¹⁶⁹

Nevertheless, this law only applies to minor league baseball players and thus teams in other sports must continue to ensure that the pay provided to their minor league athletes complies with the law. On this issue, it therefore might be important to know, as mentioned earlier, that the value of food and housing provided to employees is credited toward an employee's wages.¹⁷⁰

161. Ekmekjian, *supra* note 158, at 243-44.

162. See Robert Pannullo, *The Struggle for Labor Equality in Minor League Baseball: Exploring Unionization*, 34 A.B.A. J. LAB. & EMP. L. 443, 445-46 (2020).

163. *Id.*

164. *Id.* at 444.

165. *Id.* at 446-47.

166. See *Senne v. Kansas City Royals Baseball Corp.*, 934 F.3d 918 (9th Cir. 2019), *cert. denied*, 141 S.Ct. 248 (2020).

167. Nathaniel Grow, *The Save America's Pastime Act: Special Interest Legislation Epitomized*, 90 U. COLO. L. REV. 1013, 1015 (2019).

168. See *id.* at 1031 (citing 29 U.S.C. § 213(a)(19)).

169. Grow, *supra* note 167, at 1030.

170. *Credit Towards Wages Under Section 3(m) Questions and Answers*, U.S. DEP'T LAB. WAGE & HOUR DIV., [https://www.dol.gov/agencies/whd/direct-care/credit-wages/faq#:~:text=Section%203\(m\)%20](https://www.dol.gov/agencies/whd/direct-care/credit-wages/faq#:~:text=Section%203(m)%20)

Second, the 2010 Patient Protection and Affordable Care Act obligates employers who employ an average of at least fifty full-time employees on business days to provide some basic level of health insurance to its employees or pay a financial penalty,¹⁷¹ more commonly known as the employer mandate. However, the coverage requirement only applies to “full-time employees,” defined as those employees who, “with respect to any month, . . . is employed on average at least 30 hours of service per week.”¹⁷² Many minor league athletes work right around this threshold, particularly when traveling for away games.¹⁷³ Consequently, depending on how many employees the entity employing the minor league players may have, a team may be obligated to provide its minor league players with health insurance.

Third, there is a disability-related issue related to all athletes but since it is something of a gatekeeping issue, it is addressed in this Section. The ADA forbids pre-employment medical exams or inquiries regarding whether an applicant is “an individual with a disability or as to the nature or severity of such disability.”¹⁷⁴ There is no sports exception, though in other work, my co-authors and I have proposed one.¹⁷⁵ Of note, the law does allow “preemployment inquiries [but not medical exams] into the ability of an applicant to perform job-related functions.”¹⁷⁶ Consequently:

an employer might explain the physical rigors of the job to the prospective employee and then ask the applicant whether he or she could perform those functions, with or without reasonable accommodation. In addition to inquiring about specific job-related functions, an employer could also make a general inquiry regarding whether the individual has a physical or mental impairment that would prevent him or her from performing essential job functions. Thus, an employer might ask whether there is anything the applicant thinks could impede his or her ability to perform the job in question. Again, these

of%20the%20FLSA%20allows%20an%20employer%20to,towards%20wages%20under%20certain%20circumstances [https://perma.cc/692Q-2LD5] (last visited Apr. 1, 2022).

171. 26 U.S.C.A. § 4980H.

172. 26 U.S.C.A. § 4980H(c)(4).

173. Pannullo, *supra* note 162, at 447.

174. 42 U.S.C. § 12112(d)(2)(A) (2012).

175. Jessica L. Roberts et al., *Evaluating NFL Player Health and Performance: Legal and Ethical Issues*, 165 U. PA. L. REV. 227, 308-11 (2017).

176. 42 U.S.C. § 12112(d)(2)(B) (2012).

provisions apply to *all* job applicants, not just qualified individuals with disabilities.¹⁷⁷

Nevertheless, establishing a claim can be challenging. This is a complicated issue which has been addressed at length in other work.¹⁷⁸ Given that many thousands of pre-employment medical exams have been conducted in the professional sports setting, the risk of litigation or enforcement seems extraordinarily low.¹⁷⁹ Nevertheless, teams should be mindful of the ways in which they may or may not be complying with all applicable employment laws, including the ADA.

D. Joint Employment Relationships

The concept of joint employment is unique—and important—to those leagues operating as a single-entity, which today includes at least MLS,¹⁸⁰ the WNBA, the NWSL,¹⁸¹ Premier League Lacrosse,¹⁸² and the XFL.¹⁸³ The term “single-entity,” in the sports context, refers to those leagues in which there is a centralized entity which substantially owns or controls the league’s operations and which contracts with the players.¹⁸⁴ Individual teams might then be shareholders in the centralized entity. The single-entity structure contrasts with

177. Roberts, *supra* note 175, at 259-60.

178. *See id.*

179. *See* Dave Siebert, *An Inside Look into the NFL Medical Exam Process at the Combine*, BLEACHER REP. (Feb. 21, 2014), <https://bleacherreport.com/articles/1968230-an-inside-look-into-the-nfl-medical-exam-process-at-the-combine>.

180. Marcos Motta & Michael Tait, *Single Entity Structure: The MLS and The Power of the League*, Football Legal (Dec. 31, 2019), [https://www.football-legal.com/content/single-entity-structure-the-mls-and-the-power-of-the-league#:~:text=Major%20League%20Soccer%20\(MLS\)%20is,a%20team%20within%20the%20MLS](https://www.football-legal.com/content/single-entity-structure-the-mls-and-the-power-of-the-league#:~:text=Major%20League%20Soccer%20(MLS)%20is,a%20team%20within%20the%20MLS).

181. *See* Paul Tenorio, *Restrictions on 15-year-old Olivia Moultrie present antitrust problem for the NWSL*, ATHLETIC (Apr. 13, 2021), <https://theathletic.com/2516805/2021/04/13/olivia-moultrie-nwsl-mls/> [<https://perma.cc/98V6-LN3X>].

182. Scott Allen, *After Two Years as Competitors, Pro Outdoor Lacrosse Leagues Announce Merger*, WASH. POST (Dec. 16, 2020), <https://www.washingtonpost.com/sports/2020/12/16/lacrosse-leagues-merge/> [<https://perma.cc/GPD9-ZQGF>].

183. Michael McCann, *Advantages and Drawbacks of the XFL Operating as a Single-Entity Sports League*, SI.COM (Jan. 26, 2018), <https://www.si.com/nfl/2018/01/26/xfl-single-entity-sports-leagues-advantages-drawbacks> [<https://perma.cc/P95W-KJFR>].

184. *See* Marc Edelman & Elizabeth Masterson, *Could the New Women’s Professional Soccer League Survive in America? How Adopting a Traditional Legal Structure May Save More Than Just a Game*, 19 SETON HALL J. SPORTS & ENT. L. 283, 295-97 (2009); Gabriel Feldman, *The Puzzling Persistence of the Single-Entity Argument for Sports Leagues: American Needle and the Supreme Court’s Opportunity to Reject a Flawed Defense*, 2009 WIS. L. REV. 835, 871-74 (2009).

the traditional league structure in which the teams, operating as individual entities, bind themselves together by a league's governing documents, usually a constitution and bylaws.¹⁸⁵

An example helps. Major League Soccer, LLC, operating as MLS, is the best-known single-entity league today.¹⁸⁶ Pennsylvania Professional Soccer, LLC is a Delaware limited liability company which operates the Philadelphia Union MLS team.¹⁸⁷ Pennsylvania Professional Soccer, LLC is a member of Major League Soccer, LLC.¹⁸⁸ This is a different structure from those of the NFL, MLB, NBA, and NHL. For example, "the NFL is an unincorporated association that... includes 32 separately owned professional football teams."¹⁸⁹ The teams are separate legal entities, such as Buffalo Bills, Inc. and Chicago Bears Football Club, Inc.¹⁹⁰ But rather than owning a joint interest in a common entity (as in MLS), the NFL is governed by a Constitution and Bylaws which is negotiated and agreed to by its member clubs.¹⁹¹

What's the point? As summarized in other work in which I was a co-author:

MLS' structure was designed to avoid the antitrust litigation and scrutiny common to the other professional sports leagues.... Section 1 of the Sherman Antitrust Act prohibits contracts, combinations, or conspiracies that unreasonably restrain trade. If an organization or joint venture is considered a single entity, there can be no multiplicity of parties agreeing to rules that might unreasonably restrain a market — such as the market for players' services through eligibility rules, a Salary Cap, or free agency rules as have often been the subjects of litigation in other leagues. In other words, without multiple parties there cannot be the contract, combination, or conspiracy necessary for antitrust scrutiny.¹⁹²

185. Edelman & Masterson, *supra* note 184, at 295-99.

186. *See Fraser v. MLS*, 284 F.3d 47 (1st Cir. 2002) (examining MLS' single-entity status).

187. *Nowak v. Major League Soccer, LLC*, No. 14-cv-3503, 2015 WL 12803590, at *1 (E.D. Pa. July 20, 2015).

188. *Id.*

189. *American Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 187 (2010).

190. *See White v. Nat'l Football League*, 765 F.3d 585, 585 (8th Cir. 2014) (listing individual team entities in case caption).

191. *Oakland Raiders v. Nat'l Football League*, 131 Cal.App.4th 621, 639 (Cal. Ct. App. 2005).

192. *Comparing Health-Related Policies & Practice in Sports*, *supra* note 100, at 191.

The extent to which this structure would be successful in fending off an antitrust challenge is debatable and beyond the scope of this Article. In any event, to protect and effectuate the single-entity defense, players execute employment contracts with MLS, not their individual teams.¹⁹³

And there is the rub. By executing their employment contracts with the league, the league—and not the teams—is the players’ employer. The leagues pay the players, provide them health insurance and other benefits, and are otherwise the party principally responsible for complying with employment laws vis-à-vis the players.

What matters to teams in this arrangement is the issue of workers’ compensation. A refresher of workers’ compensation law helps explain why. “Workers’ compensation laws provide protections and benefits for employees who are injured in the course of their employment. In the typical case, the workers’ compensation regime grants tort immunity to employers in exchange for the regime’s protections and benefits to the employee.”¹⁹⁴ In other words, “[t]he trade-off for workers’ compensation benefits from an employee’s perspective is that the laws generally bar any civil lawsuit against the employer or other employees.”¹⁹⁵

However, for an employer to take advantage of this bar, they must actually be the employer of the employee. This can present complications for single-entity leagues. In order to try and take advantage of the workers’ compensation defense in lawsuits brought by players, teams must establish that they, with the league, are joint employers of the player.

The MLS club D.C. United has instructive history with this issue. In 2012, a former player, Bryan Namoff, sued the team, its coach, doctor, and athletic trainer, alleging that the medical staff had failed to properly treat his concussion, resulting in a variety of physical and mental conditions.¹⁹⁶ The court denied D.C. United’s motion to dismiss the case based on the workers’ compensation statute, “finding that D.C. United did not provide Namoff with workers’ compensation insurance coverage and therefore did not gain the protection of the” law.¹⁹⁷ D.C. United was therefore forced to defend the case through

193. *Fraser v. MLS*, 284 F.3d 47, 53-55 (1st Cir. 2002).

194. Gabriel Feldman, *Closing the Floodgates: The Battle Over Workers’ Compensation Rights in California*, 8 FIU L. REV. 107, 109 (2012).

195. *Protecting and Promoting the Health of NFL Players*, *supra* note 148, at 214.

196. See Complaint, *Namoff v. D.C. Soccer LLC*, 2012 CA 7050 (D.C. Sup. Ct. Aug. 29, 2012).

197. *Namoff v. D.C. Soccer, LLC*, No. 2012-CA-7050, 2014 WL 3254596, at *2 (D.C. Super. May 8, 2014).

discovery.¹⁹⁸ The court ultimately granted summary judgment in favor of D.C. United and its coach and athletic trainer, finding that Namoff's claims were barred by workers' compensation laws.¹⁹⁹ After reviewing the record, the court found that MLS and D.C. United were "concurrent employers" of Namoff.²⁰⁰ In so doing, the court determined that "D.C. United controlled the day-to-day operations of Namoff's performance"²⁰¹ and contributed to the MLS workers' compensation insurance coverage through its capital contributions to the league.²⁰²

Despite the success in the *Namoff* case, D.C. United continued to face difficulties on this issue. In 2017, again, a former player, sued D.C. United, alleging, among other things, that the team had failed to properly handle his concussion.²⁰³ D.C. United sought to have the claims dismissed, citing the workers' compensation statute and *Namoff* decision.²⁰⁴ The court declined to do so before discovery on the issue could be conducted.²⁰⁵ After settlement conferences were held, the case was voluntarily dismissed.²⁰⁶

This issue merits a final clarification. You may be wondering why such lawsuits are not preempted by the CBA or why such claims would not have to be arbitrated pursuant to the CBA's grievance procedures. Indeed, the Labor Management Relations Act²⁰⁷ often bars or "preempts" state common law claims, such as negligence.²⁰⁸ However, the bar only exists where the claim is "substantially dependent upon analysis of the terms" of a CBA, *i.e.*, where the claim is "inextricably intertwined with consideration of the terms of the"

198. *Id.* at *8.

199. *Id.* at *2.

200. *Id.* at *8.

201. *Id.* at *6.

202. *Id.* at *9-11.

203. *See Horton v. Espindola*, 319 F.Supp.3d 395, 399 (D.D.C. 2018).

204. *Id.* at 403-405.

205. *Id.* at 405.

206. *Id.*

207. 29 U.S.C. § 185.

208. *See, e.g., Givens v. Tennessee Football, Inc.*, 684 F. Supp. 2d 985 (8th Cir. 2009) (claims against Club preempted); *Jeffers v. D'Alessandro*, 681 S.E.2d 405 (N.C. App. 2009) (claims against Club preempted); *Williams v. Nat'l Football League*, 582 F.3d 863 (8th Cir. 2009) (players' tort claims arising out of drug test preempted); *Sherwin v. Indianapolis Colts, Inc.*, 752 F.Supp. 1172 (N.D.N.Y. 1990) (claims against Club preempted; claims against doctors dismissed on jurisdictional grounds); *see also Brocail v. Detroit Tigers, Inc.*, 268 S.W.3d 90 (Tex. Ct. App. 2008) (MLB player's claim that club failed to provide a proper second opinion preempted).

CBA.”²⁰⁹ Not all claims meet this standard.²¹⁰ Consequently, teams need to be prepared—and appropriately insured if possible—to fight against claims by players. Though as demonstrated above, for teams in single-entity leagues, a successful defense may require discovery.

E. Youth Sports

Some sports teams operate youth programs. Of particular note, each MLS club operates an Academy that contains multiple elite youth teams, with the goal of developing the next generation of MLS talent.²¹¹ The youth component presents some important employment law considerations for both the adult employees involved and the minors themselves.

First, teams should be mindful of the Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017, more commonly referred to as the Safe Sport Act.²¹² The Safe Sport Act created the United States Center for SafeSport which, serves three principal purposes—to:

(B) exercise jurisdiction over the corporation and each national governing body with regard to safeguarding amateur athletes against abuse, including emotional, physical, and sexual abuse, in sports;

(C) maintain an office for education and outreach that shall develop training, oversight practices, policies, and procedures to prevent the abuse, including emotional, physical, and sexual abuse, of amateur athletes participating in amateur athletic activities through national governing bodies; [and]

209. *Allis-Chambers Corp. v. Lueck*, 471 U.S. 202, 213, 220 (1985); *see also In re Nat'l Football League Players' Concussion Injury Litigation*, 821 F.3d 410, 422 (3d Cir. 2016) (discussing preemption of players' common law claims); *In re Nat'l Football League Players' Concussion Injury Litigation*, 307 F.R.D. 351, 390-92 (E.D. Pa. 2015) (discussing preemption of players' common law claims).

210. *See Green v. Arizona Cardinals Football Club LLC*, 21 F.Supp.3d 1020 (E.D. Mo. 2014) (certain claims brought by former players were not preempted); *Stringer v. Minnesota Vikings Football Club, LLC*, 474 F. Supp. 2d 894, 912 (S.D. Ohio 2007) (certain claims brought by player's estate were not preempted); *Protecting and Promoting the Health of NFL Players*, *supra* note 148, at 263 (summarizing other cases in which a player's claims were found not to be preempted).

211. *See generally* MLS Soccer Staff, *Total of 94 Clubs Join Forces as Part of MLS's Elite Player Development Platforms*, MLS (May 13, 2020, 1:24 PM), <https://www.mlssoccer.com/news/mls-elite-youth-development-platform> [https://perma.cc/W3UJ-TJ6D] (discussing MLS's approach to youth development and the Academies generally).

212. 36 U.S.C. § 220541.

(D) maintain an office for response and resolution that shall establish mechanisms that allow for the reporting, investigation, and resolution, pursuant to subsection (c), of alleged sexual abuse in violation of the Center's policies and procedures[.]²¹³

The law can apply to sports teams through national governing bodies of which they are apart. For example, MLS and its clubs are members of US Soccer²¹⁴ and the NBA is a member of USA Basketball.²¹⁵ The full import of the Safe Sport Act is beyond the scope of this Article, suffice to say it is an important law and teams should be aware of its obligations thereunder.²¹⁶ Of note, the Center includes a variety of policies that teams should review and generally adopt, covering such items as one on one interactions, electronic communications, massages, lodging, transportation, locker rooms, and more.²¹⁷ Additionally, teams should require that all of its employees, contractors, and anyone else working with youth athletes on behalf of the team go through training provided by the Center.²¹⁸

Second, in a similar vein, teams should procure background checks on anyone working with youth athletes. Indeed, teams' insurance policies may require it. In so doing, teams should be mindful of any consents required or limitations imposed by law. In particular, teams should consider avoiding including a credit check as part of the background check, which can trigger various requirements under the Fair Credit Reporting Act and analogous state

213. 36 U.S.C. § 220541(a)(1)(B)-(D).

214. *Professional Leagues*, U.S. SOCCER, <https://www.ussoccer.com/organization-members/professional-leagues> [https://perma.cc/W2QQ-TBRZ] (last visited Apr. 1, 2022).

215. *Members*, USA BASKETBALL, <https://www.usab.com/about/about-usa-basketball/members.aspx> [https://perma.cc/8KYW-5KXX] (last visited Apr. 1, 2022).

216. See U.S. CENTER FOR SAFESPORT, <https://uscenterforsafesport.org/> (last visited Apr. 1, 2022), for more information on the law; Alexandria Murphy, *Better Late Than Never: Why the USOC Took So Long to Fix a Failing System for Protecting Olympic Athletes from Abuse*, 26 JEFFREY S. MOORAD SPORTS L.J. 157 (2019).

217. See *Minor Athlete Abuse Prevention Policies*, U.S. CTR. FOR SAFESPORT, <https://maapp.uscenterforsafesport.org/> [https://perma.cc/SYBT-FURL] (last visited Apr. 1, 2022).

218. See *id.*

laws.²¹⁹ Lastly, many payroll processors are able to conduct background checks for additional fees.²²⁰

Third, teams should require individuals working with youth athletes to have training in concussion awareness and management. There are a variety of training resources in the market, one of which is the HEADS UP training offered by the Centers for Disease Control and Prevention.²²¹ These types of training will help not only to protect the youth athletes but also to protect teams against potential claims that they did not properly handle a youth athlete's concussion.

Fourth, teams need to be mindful of those points in time where youth athletes begin to enter adult spaces. From an employment perspective, it should be fairly clear that the youth athlete remains exactly that until he or she signs a professional contract—in which case teams may need a parent or guardian to sign to effectuate the contract.²²² It is not uncommon for minors to become professionals, particularly in the minor leagues. For example, USL rosters often include several players under eighteen.²²³ The intermingling of minors and adult players in locker rooms raises concerns about privacy and appropriate conduct. Teams should review their management of such situations and ensure that all players act appropriately and are comfortable in their work environment.

CONCLUSION

Counsel for sports teams have to cover a wide range of areas of law. Yet, labor and employment might be the area of greatest involvement and complexity. This Article has sought to identify and summarize the most important labor and employment issues for employers, with particular focus on issues relevant to the sports industry. The practice of labor and employment law within an organization should transcend simply complying with the law to

219. See *Using Consumer Reports: What Employers Need to Know*, FED. TRADE COMM'N, <https://www.ftc.gov/tips-advice/business-center/guidance/using-consumer-reports-what-employers-need-know> [https://perma.cc/Z43P-XMY3] (Oct. 2016);, *A Summary of Your Rights Under the Fair Credit Reporting Act*, CONSUMER FINANCIAL PROTECTION BUREAU, <https://www.consumer.ftc.gov/articles/pdf-0096-fair-credit-reporting-act.pdf> [https://perma.cc/J77S-GJA9] (last visited Apr. 1, 2022).

221. See, e.g., Juvy Vallescas, *9 Best Background Check Companies in 2022*, FIT SMALL BUSINESS (Mar. 24, 2022), <https://fitsmallbusiness.com/best-background-check-companies/> (last visited Apr. 1, 2022).

222. See, *HEADS UP to Youth Sports: Online Training*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/headsup/youthsports/training/index.html> [https://perma.cc/N87G-KX4K] (last visited Apr. 1, 2022).

223. See John H. Shannon & Richard J. Hunter, Jr., *Principles of Contract Law Applied to Entertainment and Sports Contracts: A Model for Balancing the Rights of the Industry with Protecting the Interests of Minors*, 48 LOY. L.A. L. REV. 1171, 1176-81 (2015) (discussing principles of contract law as they related to minors).

224. See, e.g., LA Galaxy II, *Roster*, LA GALAXY, <https://www.lagalaxy.com/players/squad/galaxyii> [https://perma.cc/VGZ5-PX4D] (last visited Apr. 1, 2022).

helping form the foundation and infrastructure for a welcoming and successful work environment. By understanding the letter and intent of labor and employment laws, counsel can help craft policies and practices which not only protect the team but also protect and promote the wellbeing of the team's employees.