



THE FOOTBALL PLAYERS
HEALTH STUDY
AT HARVARD UNIVERSITY

Protecting and Promoting the **Health of NFL Players:** Legal and Ethical Analysis and Recommendations

Part 4: **NFL Club Employees**



Coaches



Club
Employees

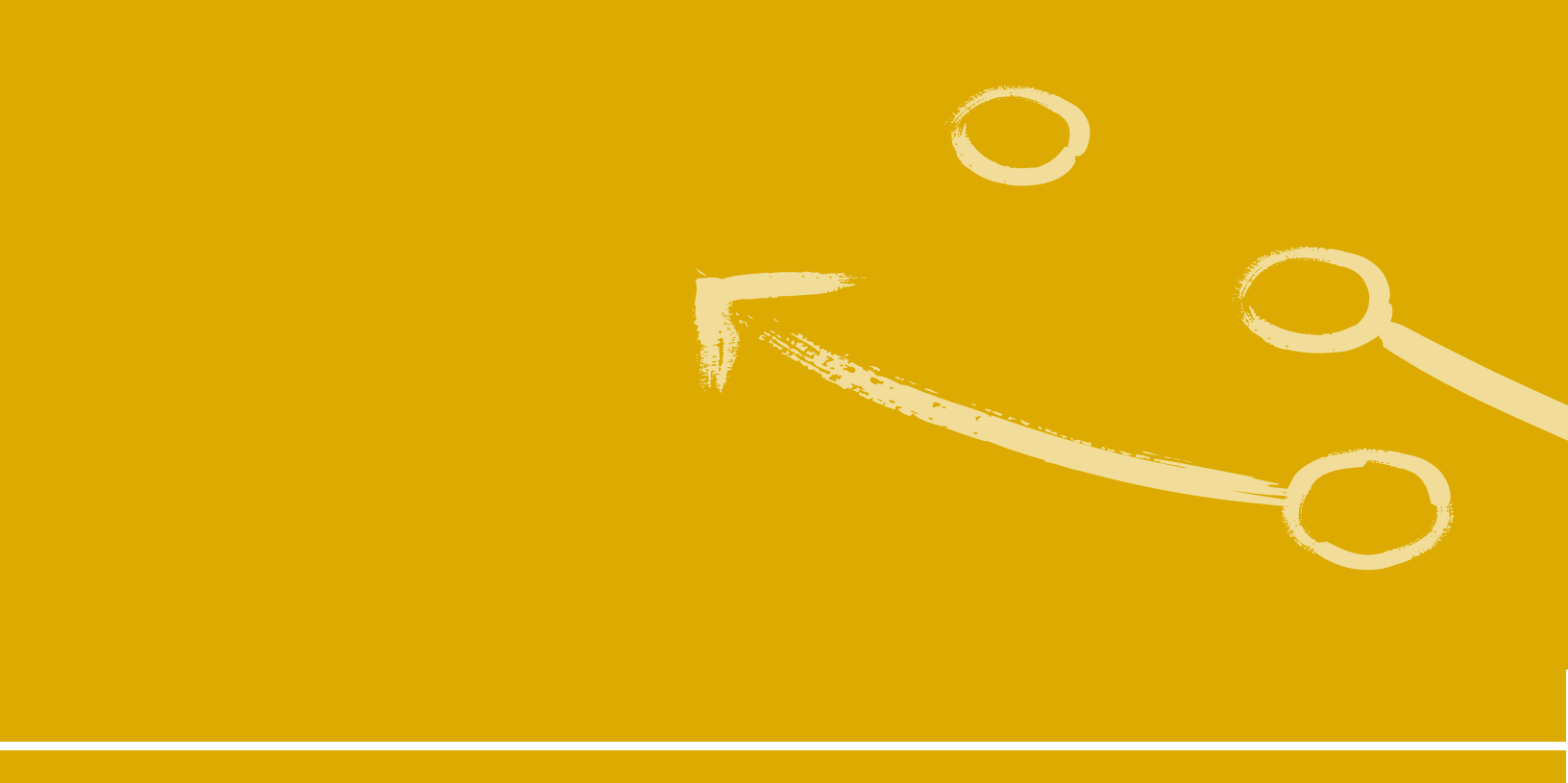


Equipment
Managers

Christopher R. Deubert
I. Glenn Cohen
Holly Fernandez Lynch

Petrie-Flom Center for Health Law
Policy, Biotechnology, and Bioethics

Harvard Law School



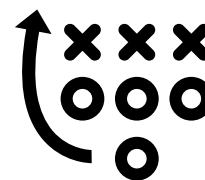
Part 4 discusses those stakeholders who are not a part of the medical staff but otherwise fall under the control of the club, including: coaches; club employees; and, equipment managers. Additionally, we remind the reader that while we have tried to make the chapters accessible for standalone reading, certain background or relevant information may be contained in other parts or chapters, specifically Part 1 discussing Players and Part 3 discussing the NFL and NFLPA. Thus, we encourage the reader to review other parts of this Report as needed for important context.





Chapter 9

Coaches



Of all of the stakeholders considered in this Report, coaches have the most authority over players, and impose the most direct physical and psychological demands on them. Coaches can help players maximize their potential, but in some cases, may also contribute to the degradation of players' health. For these reasons and those discussed below, coaches are important stakeholders in player health.

Before we begin our analysis, it is important to point out that throughout this chapter we emphasize that the practice of coaches is likely heterogeneous from club to club at least to some extent. Nevertheless, we were unable to interview coaches as part of this Report to gain a better understanding of their work. In November 2014, we notified the NFL that we intended to seek interviews with club personnel, including general managers, coaches, doctors, and athletic trainers. The NFL subsequently advised us that it was “unable to consent to the interviews” on the grounds that the “information sought could

directly impact several lawsuits currently pending against the league.” Without the consent of the NFL, we did not believe that the interviews would be successful and thus did not pursue the interviews at that time. Instead, we have provided these stakeholders the opportunity to review draft chapters of the Report. We again requested to interview club personnel in July 2016 but the NFL did not respond to that request. The NFL was otherwise cooperative—it reviewed our Report and facilitated its review by club doctors and athletic trainers. The NFL also provided information relevant to this Report, including but not limited to copies of the NFL’s Medical Sponsorship Policy (discussed in Chapter 2: Club Doctors) and other information about the relationships between clubs and doctors.

In addition, in order to ensure that this chapter was as accurate and valuable as possible, we invited the American Football Coaches Association (AFCA) and the National Football League Coaches Association (NFLCA), both described below, to review a draft version of this chapter prior to publication. The AFCA reviewed the chapter but had no comments or suggested edits.¹ David Cornwell, the Executive Director of the NFLCA, reviewed the chapter and provided comments.

(A) Background

The importance of NFL coaches to a player’s career is obvious but cannot be understated. NFL coaches work incredible hours and face unrelenting criticism and pressure to succeed.² Coaches must be successful in order to retain their jobs and face pressure to provide good outcomes for the team. That pressure no doubt infects their relationship with their players and in some cases is transferred to the players. Head coaches are the individuals ultimately most responsible for the club’s performance on the field and thus take on an immense stature and presence within the organization.³ Coaches largely determine the club’s culture,³ dictate the pace and physicality of practice and workouts, and decide who plays—a decision often borne out by intense physical competition.⁴ Moreover, some head coaches are the final decision-makers on player personnel decisions.⁴

In a 2012 arbitration decision concerning allegations that New Orleans Saints coaches had instituted a “bounty”

scheme to injure opposing players, discussed in detail below, former NFL Commissioner Paul Tagliabue, acting as arbitrator, described the control coaches have over players:⁵

NFL players on average have short careers; their careers can end suddenly through injury or declining skills; players want to be good, cohesive members of the team, or unit, not complainers or dissenters; and players accept that they work for coaches, in “programs” conceived by coaches. These are programs for which coordinators and assistant coaches are often specially selected and hired to execute. Here we have a classic example: Head Coach Payton hired Defensive Coordinator Williams with directions to make the Saints’ defense “nasty.”

In such circumstances, players may not have much choice but to “go along,” to comply with coaching demands or directions that they may question or resent. They may know—or believe—that from the coaches’ perspective, “it’s my way or the high-way.” Coaching legends such as George Halas and Vince Lombardi are not glorified or remembered because they offered players “freedom of choice.”

While more recent and current coaches may debate whether and how much coaching approaches to “do it my way” have changed over time, it is clear that directions such as those given by the Saints’ coaches in creating the Program are usually followed by most players. NFL head coaches told me in my seventeen years as Commissioner, “If players don’t do it our way, they can find another team to pay them.”⁵

NFL club coaching staffs are large. A typical NFL coaching staff consists of 15 to 20 people: the head coach; an offensive coordinator responsible for the offensive plays and players; a defensive coordinator responsible for the defensive plays and players; a special teams coordinator responsible for the special teams plays and players; and, position coaches and assistant position coaches at every nearly every position in the game of football.

Considering the size of NFL rosters and the scope of a head coach’s duties, most players communicate principally with their position coaches.⁶ For example, position coaches are the ones instructing and working with the players during practice. Yet given the rigid limits on on-field practice time

a See, e.g., Mark Fainaru-Wada & Steve Fainaru, *League of Denial: The NFL, Concussions, and the Battle for Truth* 213 (2013) (discussing New England Patriots head coach Bill Belichick ordering recently concussed linebacker Ted Johnson to participate in contact drills during practice and Johnson describing such pressure as common among NFL coaches).

b See, e.g., *id.* at 14 (discussing a particularly violent drill known as the “Nutcracker” and New England Patriots coach Bill Belichick’s affinity for it: “Belichick believed the Nutcracker answered some of football’s most fundamental questions: ‘Who is a man? Who’s tough? Who’s going to hit somebody?’”).

c Christopher R. Deubert, an author of this Report, and the firm at which he formerly practiced, Peter R. Ginsberg Law, LLC, represented former New Orleans Saints player Jonathan Vilma in the “Bounty”-related legal proceedings.

d Former Player 1 described his interactions with the head coach as “minimal interaction,” while Current Player 1 stated “we spend every day with our position coach.”

(three hours per day),⁶ it is the off-field work that is increasingly important. It is perhaps in meetings and video sessions where position coaches provide their best instruction and get to know the players best.

Strength and conditioning coaches also play an important role in a player's career. As their title implies, strength and conditioning coaches are responsible for overseeing a player's general fitness and physical preparedness for NFL games.⁷ Strength and conditioning coaches create weightlifting and stretching programs for players and otherwise monitor and assist players to ensure that they are in the best possible condition to play each week.⁸ Given the importance of NFL players' health to the success of the team, NFL clubs and players consider strength and conditioning coaches to be among their most important coaches and staff.^{9,e}

The collective bargaining agreement (CBA) contains no references to or requirements for strength and conditioning coaches. Nevertheless, NFL strength and conditioning coaches typically have a college degree in exercise science or a similar discipline and certification from the National Strength and Conditioning Association.¹⁰

NFL coaches might be members of one, both, or neither of two relevant professional associations: the AFCA; and, the NFLCA.

The AFCA is a voluntary organization of more than 11,000 high school, college or professional football coaches.¹¹ The AFCA is largely directed towards college coaches. AFCA members vote for the weekly Coaches Poll, which is one of the long-standing principal methods for ranking and evaluating college football teams.¹² Nevertheless, the AFCA occasionally consults with the NFL¹³ and it is a well-respected organization with a Boards of Trustees past and present that includes many of the most successful college football coaches in history.¹⁴

The NFLCA is more loosely organized than the AFCA. The NFLCA, in its own language, "is a voluntary non-union association that represents the over six hundred coaches and assistant coaches currently employed by the thirty-two individual National Football League Clubs, as well as many retired coaches formerly employed by the NFL teams."^{15,f} In February 2012, the NFLCA hired longtime

Coaches largely determine the club's culture, dictate the pace and physicality of practice and workouts, and decide who plays—a decision often borne out by intense physical competition.

sports attorney David Cornwell as its Executive Director in a part-time capacity.¹⁶

Nevertheless, the NFLCA has a more subdued public status compared to the AFCA. The NFLCA has no website, does not negotiate the terms and conditions of coaches' employment, and rarely makes any positions known (to the extent it has any).

(B) Current Legal Obligations^g

The principal source for regulating the behavior of coaches is the CBA. The 2011 CBA contains multiple provisions governing coaches' health obligations to players. We summarize those provisions here:

- 1. Offseason Workouts:** Offseason workout programs are limited to nine weeks total, separated into three phases of varying intensity and strict prohibitions against live contact.¹⁷ The 9-week limitation is reduced from the 14 weeks permitted under the prior CBA.¹⁸ "The head coach and the Club[] are jointly responsible" for ensuring compliance with the offseason workout rules and are subject to fines beginning at \$100,000 for any violations.¹⁹
- 2. Minicamps:** Each club is limited to one maximum mandatory minicamp for veterans, unless the club hired a new coach, in which case it can hold two mandatory minicamps.²⁰ Minicamps are limited to three days in length,²¹ and there is a strict prohibition against contact during minicamps.²² In addition, all on-field activities from minicamps must be filmed to ensure compliance.²³ The head coach and club are jointly responsible for ensuring compliance with the preseason training camp rules and are subject to the same discipline scheme outlined in Article 21 governing Offseason Workouts.²⁴

e Current Player 6: "I think an important part in player health is the strength coach."

f The NFLCA's status as a "non-union association" is important. If the NFLCA were to seek recognition as a union from the National Labor Relations Board, it might not be able to include all coaches in its membership. The National Labor Relations Act, the federal statute governing labor relations, exempts "supervisors" from its protections, which may include some coaches, particularly head coaches. Supervisors are defined as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action[.]" 29 U.S.C. § 152(11); 29 U.S.C. § 164.

g The legal obligations described herein are not an exhaustive list but are those we believe are most relevant to player health.

3. Preseason Training Camps: Preseason training camps begin on July 15 at the earliest.²⁵ Two-a-day practices can occur only if certain criteria are met: “(i) players may be on the field for a total of no more than four hours per day; (ii) players may participate in no more than one padded practice per day, which shall be no longer than three hours of on-field activities; (iii) there must be at least a three hour break after the practice; and (iv) the second practice on the same day may only be for a maximum of the remaining available on-field time, and shall be limited to only ‘walk-through’ instruction (i.e., no helmets, full-speed pre-snap, and walking pace after the snap).”²⁶ In addition, all on-field activities from preseason training camp must be filmed to ensure compliance.²⁷ The head coach and club are jointly responsible for ensuring compliance with the preseason training camp rules and are subject to the same discipline scheme outlined in Article 21 governing Offseason Workouts.²⁸

4. Regular Season and Postseason Practices: Clubs are limited to 14 padded practices during the season and one per week during the postseason.²⁹ During such practices, on-field activities are limited to three hours per day.³⁰ Players must have at least four consecutive off days during bye weeks.³¹ All regular and postseason practices must be filmed to ensure compliance.³² The head coach and club are jointly responsible for ensuring compliance with the preseason training camp rules and are subject to the same discipline scheme outlined in Article 21 governing Offseason Workouts.³³

5. Days Off: Clubs are required to provide players with five off days during preseason and four off days per month during the regular season (not including days off during bye weeks).³⁴

(C) Current Ethical Codes

The AFCA maintains a Code of Ethics.³⁵ The Code of Ethics, last updated in 1997, is 20 pages long and covers nine coaching contexts: responsibilities to players; responsibilities to the institution; rules of the game; officials; public relations; scouting; recruiting; game day; and, all-star games.³⁶ The AFCA’s Code of Ethics is principally geared toward college football coaches with its references to recruiting and academic endeavors. Consequently, our analysis focuses on those provisions relevant to players, and, player health in particular.

The Code of Ethics is premised on a 1927 report from Fielding Yost,³⁷ a college football coach from 1897 to 1926, including 25 seasons at the University of Michigan. Yost’s report included ten ethical standards by which he believed all coaches ought to abide, including “to consider the welfare of the players of paramount importance at all times and not to countenance their exploitation for

personal or private gain.”³⁸ Article One of the current Code of Ethics, entitled Responsibilities to Players, expounds on Yost’s proclamation:

1. In his relationships with players under his care, the coach should always be aware of the tremendous influence he wields, for good or bad. Parents entrust their dearest possession to the coach’s charge; and, the coach, through his own example, must always be sure that the young men who have played under him are finer and more decent men for having done so. The coach should never place the value of a win above that of instilling the highest desirable ideals and character traits in his players. The safety and welfare of his players should always be uppermost in his mind, and they must never be sacrificed for any personal prestige or selfish glory.
2. In teaching the game of football, the coach must realize that there are certain rules designed to protect the player and provide common standards for determining a winner and loser. Any attempts to circumvent these rules, to take unfair advantage of an opponent, or to teach deliberate unsportsmanlike conduct, have no place in the game of football, nor has any coach guilty of such teaching any right to call himself a coach. The coach should set the example for winning without boasting and losing without bitterness. A coach who conducts himself according to these principles need have no fear of failure, for in the final analysis, the success of a coach can be measured in terms of the respect he has earned from his own players and from his opponents.
3. Prompt and professional medical attention is a responsibility of the coach. The diagnosis and treatment of injuries is a medical problem; a coach should not involve himself with the diagnosis of any injury. It is important that a solid, independent, and competent medical program of diagnosis and treatment be established and that a coach support such a program in the best interest and well-being of his players.
4. Under no circumstances should a coach authorize or tolerate the use of illegal or performance enhancing drugs. All medicines used by student-athletes should be under the direction of a physician or other appropriate medical personnel.
5. A coach should know and understand rules of eligibility and not violate any rules that would jeopardize his institution or players under his direction.
6. Academics and athletics are a joint effort, each providing benefits to the participants. A coach should encourage the proper time-management skills to his men that will allow them to achieve success both on the playing field and in the classroom. A coach should support the academic endeavors of his players.

The NFLCA does not have a Code of Ethics.

(D) Current Practices

As described in the Background, coaches remain predominant figures in an NFL player's career. Players indicated that their relationships with coaches varied (Current Player 5: "it's very individual"; Current Player 6: "it depends on the coach.")^h Nevertheless, players also discussed that there is often a very different relationship between players and coaches when the coaches were themselves NFL players. Players generally view these coaches as more credible and sympathetic.ⁱ Current Player 6 said "I think coaches that have played kind of understand things a little bit better." Similarly, players also often develop close relationships with their position coaches, with whom they spend most of their time.^j Despite these bonds, players are still reluctant to discuss health-related issues with the coaches for fear that the information will be relayed through the organizational hierarchy.

Interviews and discussions with players and contract advisors revealed continuing concern that coaches place strong implicit (and sometimes explicit) pressure on the players and medical staff concerning a player's treatment and return to play:^k

- **Current Player 4:** *"I think that [player health] is much less of a priority to them than winning and/or producing the best players on the field and getting the best production out of them . . . [T]here is a certain level of distrust with the coaches."*
- **Current Player 5:** *"I've heard a coach tell a player, 'You need to get better, you need to get healthy or else you're going to get cut because you're missing out on [practice].'" "I heard a coach . . . say 'If you pull this muscle again, I'm cutting you or I'm fining you[.]'"*
- **Current Player 7:** *"[I have heard coaches say] so what's the verdict on him? Are they going to be back in time? We need him."*

^h Current Player 8 said: "For guys like me who bounce around, and spend a season or a few weeks in a place, I don't think coaches care that much about my health."

ⁱ See also Rob Huizenga, *You're Okay, It's Just a Bruise* 231–32 (1994) (in discussing former Raiders coach Art Shell, "Shell looked me straight in the eye and said, 'Tell [the player] not to worry, I understand perfectly. I was a player. I'm not going to let him put one foot on the practice field until he's one hundred percent.'").

^j Current Player 9: "I think position coaches have a little more invested in the individual players and so they care a little bit more about your situation." We reiterate that our interviews were intended to be informational but not representative of all players' views and should be read with that limitation in mind.

^k Former Player 3 disagreed: "Coaches would obviously want to know from the medical staff, 'hey, will the guy be able to play?' But I would say they never put any pressure." Also of note, A 2015 study found that 53.7 percent of clinicians (doctors or athletic trainers) in college sports reported having experienced pressure from coaches to prematurely clear athletes to return to participation after a concussion. Emily Kroshus et al., *Pressure on Sports Medicine Clinicians to Prematurely Return Collegiate Athletes to Play After Concussion*, 50 J. Athletic Training 944 (2015).

- **Current Player 8:** *"The head coach meets with the head trainer and says, 'You know, this guy's on the bubble . . . we need him this Sunday.' And he gets bumped off of the bubble."*
- **Current Player 10:** *"[I]t can get a little testy because, in general, the coaches want the players on the field and the trainers do what's best for the players . . . But [the] coaches, their job is to win games, and it's such a bottom line business for them and so they want their best players out there."*
- **Former Player 2:** *"The NFL is a performance business . . . So if you're not winning football games and the head coach is on the hot seat and his star player is nursing their hamstring issue, there's going to be pressure on the trainer to get the guy out there."*

Moreover, one contract advisor interviewed relayed that he has had players tell him that assistant coaches have told players that "the concussion protocol that the NFL has in place is nonsensical and that if they feel good enough to go, they should." Nevertheless, Current Player 2 did also "think that the coaches are genuinely concerned about player health."^m Former Player 2 agreed that coaches are generally "concerned" about player health but noted that the high turnover of players in the NFL often prevents coaches and players from having any relationship that would cause the coach to care.ⁿ Finally, Current Player 10 believes that, while "there's been a [positive] shift in the last five to ten years" concerning coaches' attitudes towards player health, he did not "think player health is the number one concern for coaches. It's wins and losses."

The implicit pressure to play often comes from comments made by coaches.³⁹ A common phrase attributed to NFL coaches is that "sometimes the best ability is availability."^{40,o} Former San Francisco 49ers linebacker

^l For examples of situations in which coaches allegedly pressured players to return to play, Mark Fainaru-Wada & Steve Fainaru, *League of Denial: The NFL, Concussions and the Battle for Truth* 129 (2013) (discussing former New York Jets head coach Bill Parcells effectively ordering concussed tight end Kyle Brady to return to the field during 1999 playoff game); *id.* at 213 (discussing New England Patriots head coach Bill Belichick ordering recently concussed linebacker Ted Johnson to participate in contact drills during practice). In addition, strength and conditioning coaches should be differentiated from the football-specific coaches. When players are rehabilitating their injuries, they generally do it under the supervision of the athletic trainer and strength and conditioning coach on a separate practice field away from the coaches and other players.

^m "I've noticed our coaching staff say, 'Hey, get him out of there, he doesn't look right.'"

ⁿ Former Player 3 also believes that coaches care about player health: "It doesn't do the coach any good if the guy is out there and he's not right."

^o Similarly, according to former Seattle Seahawks club doctor Pierce Scranton, one former Seahawks head coach instituted a "no practice, no play" rule, whereby if players were too injured to practice, they could not play in the next game. According to Scranton, the rule was intended to pressure players to practice even while hurt or injured. Pierce E. Scranton, Jr., *Playing Hurt: Treating and Evaluating the Warriors of the NFL* 169 (2001).

Gary Plummer described the pressure from coaches as follows:

The coaches had euphemisms. They'll say: 'You know, that guy has to learn the difference between pain and injury.' Or: 'He has got to learn the difference between college and professional football.' What he's saying is the guy's a pussy and he needs to get tough or he's not going to be on the team. It's a very, very clear message.⁴¹

Interviews and discussions with players and contract advisors revealed continuing concern that coaches place strong implicit (and sometimes explicit) pressure on the players and medical staff concerning a player's treatment and return to play.

Plummer's comments are buttressed by a 2016 comment from Miami Dolphins head coach Adam Gase concerning star wide receiver DeVante Parker's injury problems:

Sometimes it takes some guys more time to learn more than others. Eventually you get tired of being the guy standing on the sideline. I do think he's a little frustrated. He's been the odd man out all the time. Eventually . . . he will know how to push through certain kinds of pain.⁴²

Nevertheless, several players also seemed to excuse the coaches' actions as inherent to the NFL:

- **Current Player 2:** *"It's the culture of football, coaches want their players on the field and they're going to apply that pressure to their trainers."^p*
- **Current Player 6:** *"[M]ost coaches and pretty much anyone in this business has to look out for themselves."*
- **Current Player 8:** *"I don't want to condemn them for [placing pressure on the medical staff], but that's the job. The coach absolutely needs the parts to the machine to be out there for it to function."*

- **Former Player 2:** *"[Putting pressure on the medical staff] is just the nature of the beast."*

Additionally, there is some evidence that in recent years coaches have largely removed themselves from player health decisions, perhaps a change from years past. Moreover, coaches that do not have good reputations among players might find it challenging to recruit players to join the club during free agency.

One incident in which a coach positively involved himself in a player health matter is worth mentioning. In a 2015 game, the Pittsburgh Steelers' medical staff suspected a player of having sustained a concussion and thus attempted to evaluate the player. When the player resisted the evaluation in hopes of staying in the game, Steelers head coach Mike Tomlin intervened and told the player "You will listen to these doctors, and you'll do it now." The player was then evaluated and removed from the game.⁴³

Two additional incidents bear mentioning to shed light on the role of coaches in today's NFL.

First, in March 2012, the NFL issued a press release alleging that New Orleans Saints coaches and players had participated in a "bounty" scheme whereby coaches and players provided financial rewards for good plays as well as for injuring opposing players in violation of NFL rules.⁴⁴ On March 21, 2012, about three weeks after the initial press release, the NFL suspended and fined Saints coaches and officials.⁴⁵ The Saints were also fined \$500,000 and required to forfeit second round draft picks in the 2012 and 2013 NFL Drafts.⁴⁶

The Saints and the coaches accepted the punishments, *i.e.*, did not pursue legal action, while denying the facts upon which the punishments were based.⁴⁷

On May 2, 2012, the NFL suspended four players for their alleged involvement in the "bounty" program.⁴⁸ The players challenged their discipline through various legal options including through CBA arbitration mechanisms and in federal court.⁴⁹ Ultimately, former NFL Commissioner Paul Tagliabue presided over a four-day arbitration designed to ascertain the truth of the NFL's allegations and the fairness of the NFL's punishment.⁵⁰

On December 11, 2012, former Commissioner Tagliabue issued his decision, vacating all discipline against the players but "affirm[ed]" Commissioner Goodell's finding that the players engaged in conduct detrimental to the game of football, except as to one of the four players. Commissioner Tagliabue principally placed the blame for any wrongdoing on the Saints' coaches and organization and faulted

^p Contract Advisor 6 expressed a similar sentiment: "[S]o many coaches believe you play hurt."

Commissioner Goodell's efforts to change a long-standing practice in the NFL too quickly and with insufficient notice to the clubs and players.⁵¹ Tagliabue's decision made clear that the players were under tremendous pressure to follow the coaches' lead.

Commissioner Tagliabue had particularly strong words for the coaches. Tagliabue "condemn[ed]" the Saints' coaches for having created the pay-for-performance program, for pressuring a player to lie, and for their "irresponsible," "persistent and flagrant contempt for clear League rules and policies regarding player safety."⁵² By vacating the player discipline, Commissioner Tagliabue principally laid the blame for any wrongdoing on the Saints' coaches.

Second, on October 28, 2013, Miami Dolphins offensive lineman Jonathan Martin left the Dolphins and checked himself into a nearby hospital, requesting psychological treatment. In the weeks and months that followed, it was reported that Martin had left the club as a result of bullying and harassment from his teammates, in particular fellow offensive lineman Richie Incognito.

On February 14, 2014, attorney Ted Wells and his law firm Paul, Weiss, Rifkind, Wharton & Garrison LLP released a report, commissioned by the NFL, entitled "Report to the National Football League Concerning Issues of Workplace Conduct at the Miami Dolphins." ("Wells Report.")⁵³ To summarize, the Wells Report found the Dolphins locker room to be a place of inappropriate and abusive conduct by the players as well as, at times, some coaches. Of relevance, the Wells Report gave a generally negative view of offensive line coach Jim Turner's involvement in the situation, suggesting that Turner had failed to take action to correct some of the inappropriate behavior and improperly defended Incognito.

The Dolphins fired Turner five days after the Wells Report.

In September 2014, Turner, through the law firm Peter R. Ginsberg Law, LLC, issued a Response to the Wells Report which explained his exemplary career and his involvement in the Martin-Incognito situation.⁵⁴ Turner's response also included interviews with several Dolphins offensive linemen who disagreed with all or parts of the Wells Report.^q

Although neither situation resulted in litigation in which a coach was a party, both situations raised interesting questions concerning a coach's perceived and actual duties to his players.

(E) Enforcement of Legal and Ethical Obligations^r

In the event a player or the NFLPA believes a coach has violated his obligations to the players, the player could try to commence a Non-Injury Grievance in accordance with the CBA.^s The 2011 CBA directs certain disputes to designated arbitration mechanisms^t and directs the remainder of any disputes involving the CBA, a player contract, NFL rules or generally the terms and conditions of employment to the Non-Injury Grievance arbitration process.⁵⁵ Importantly, Non-Injury Grievances provide players with the benefit of a neutral arbitration and the possibility of a "money award."⁵⁶

However, there are several impediments to pursuing a Non-Injury Grievance against a coach (or any club employee). First and foremost, coaches are not parties to the CBA and thus likely cannot be sued for violations of the CBA.⁵⁷ Instead, the player could seek to hold the club responsible for the coach's violation of the CBA.⁵⁸ Second, the player's claim might be barred by workers' compensation statutes. Workers' compensation statutes provide compensation for workers injured at work and thus generally preclude lawsuits against co-workers based on the co-workers' negligence.⁵⁹ This was the result in the *Stringer* case (discussed in more detail below), and in multiple cases brought by NFL players against club doctors.⁶⁰ It is unclear how this bar would apply in an arbitration. Third, Non-Injury Grievances must be filed within 50 days "from the date of the occurrence or non-occurrence upon which the grievance is based,"⁶¹ a timeframe that is much shorter than your typical statute of limitations. And fourth, players

^r Appendix K is a summary of players' options to enforce legal and ethical obligations against the stakeholders discussed in this Report. In addition, for rights articulated under either the CBA or other NFL policy, the NFLPA and the NFL can also seek to enforce them on players' behalves.

^s See 2011 CBA, Art. 43 (discussing Non-Injury Grievance procedures). The term "Non-Injury Grievance" is something of a misnomer. The CBA differentiates between an "Injury Grievance" and a "Non-Injury Grievance." An Injury Grievance is exclusively "a claim or complaint that, at the time a player's NFL Player Contract or Practice Squad Player Contract was terminated by a Club, the player was physically unable to perform the services required of him by that contract because of an injury incurred in the performance of his services under that contract." 2011 CBA, Art. 44, § 1. Generally, all other disputes (except System Arbitrations, see 2011 CBA, Art. 15) concerning the CBA or a player's terms and conditions of employment are Non-Injury Grievances. 2011 CBA, Art. 43, § 1. Thus, there can be disputes concerning a player's injury or medical care which are considered Non-Injury Grievances because they do not fit within the limited confines of an Injury Grievance.

^t For example, Injury Grievances, which occur when, at the time a player's contract was terminated, the player claims he was physically unable to perform the services required of him because of a football-related injury, are heard by a specified Arbitration Panel. 2011 CBA, Art. 44. Additionally, issues concerning certain Sections of the CBA related to labor and antitrust issues, such as free agency and the Salary Cap, are within the exclusive scope of the System Arbitrator, 2011 CBA, Art. 15., currently University of Pennsylvania Law School Professor Stephen B. Burbank.

^q Christopher R. Deubert, an author of this Report, previously practiced at Peter R. Ginsberg Law, LLC, and participated in the creation of Turner's response to the Wells Report prior to joining The Football Players Health Study at Harvard University.

likely fear that pursuing a grievance against a coach could result in the club terminating him.^u

As an alternative to pursuing a Non-Injury Grievance, the NFLPA (at the player's request) might request the NFL to enforce the terms of the CBA and issue the required punishment. For example, after reports of a fight between players during a June 18, 2014 minicamp for the defending Super Bowl champion Seattle Seahawks, the NFLPA filed a complaint and requested the videotape from the practice as was its right.⁶² The videotapes revealed extensive violations of the prohibitions against live contact during minicamps, resulting in a \$100,000 fine for Seahawks head coach Pete Carroll, a \$200,000 fine for the Seahawks, and the loss of two minicamp practices for the Seahawks in 2015.⁶³ Moreover, the Seahawks were repeat offenders, having also violated the no-contact rules in 2012.⁶⁴

A player might also sue in court, but such lawsuits are unlikely to succeed for reasons discussed below. As a preliminary matter, while it is not uncommon for high school and youth sport coaches to be sued for their alleged involvement in a player injury,⁶⁵ research has only revealed two cases in which an NFL player (or someone on his behalf) sued an NFL coach.

In 2001, Minnesota Vikings Pro Bowl offensive tackle Korey Stringer died of complications from heat stroke after collapsing during training camp.⁶⁶ Stringer's family later sued the Vikings, Vikings coaches, trainers and affiliated doctors, the NFL, and equipment manufacturer Riddell. Of specific relevance, Stringer's family sued the Vikings' head coach and offensive line coach. In 2003, a Minnesota trial court granted summary judgment^v in favor of the Vikings, the head coach and the offensive line coach.⁶⁷ The court determined that the head coach and the offensive line coach were acting within the scope of their employment concerning Stringer's medical situation, were not grossly negligent, and thus were immune from liability pursuant to Minnesota's workers' compensation laws.⁶⁸

In addition to workers' compensation statutes, the CBA also presents a major obstacle for a player suing a coach. Lawsuits are another possible enforcement method, but face significant barriers. This is because the Labor Management Relations Act ("LMRA")⁶⁹ bars or "preempts" state common law^w claims, such as negligence, 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" CBA.⁷⁰ In order to assess a coach's duty to an NFL player and whether it was satisfied—an essential element of a negligence claim—the court would likely have to refer to and analyze the terms of the CBA, resulting in the claim's preemption.⁷¹ Preemption occurs even though coaches are not parties to the CBA and thus likely cannot be a party in any CBA grievance procedure. So long as the player's claim is "inextricably intertwined" with the CBA, it will be preempted. In these cases, player complaints must be resolved through the enforcement provisions provided by the CBA itself (*i.e.*, a Non-Injury Grievance against the club), rather than litigation.

In a 1995 lawsuit, two Houston Oilers players alleged that the Houston Oilers general manager and strength and conditioning coach subjected the players to a phony and brutal rehabilitation program designed to coerce the players into quitting the club.⁷² The players alleged state law claims of coercion, duress, extortion, assault and battery, and intentional infliction of emotional distress. The United States District Court for the Southern District of Texas held that the players' claims were preempted by the CBA, because the CBA and the players' contracts governed rehabilitation programs.⁷³ The United States Court of Appeals for the Fifth Circuit affirmed.⁷⁴

While these avenues for actions against coaches seem unfruitful, the AFCA Code of Ethics does provide a potential enforcement mechanism. Pursuant to the Code of Ethics, the AFCA Committee on Ethics "is empowered to investigate any and all alleged violations of the Code . . . from any source[.]"⁷⁵ The Code of Ethics includes a robust hearing mechanism, including the presentation of evidence and calling of witnesses.⁷⁶ Nevertheless, the Committee's disciplinary authority is limited to a letter of reprimand or

u Current Player 8: "You don't have the gall to stand against your franchise and say 'They mistreated me.' . . . I, still today, going into my eighth year, am afraid to file a grievance, or do anything like that[.]" While it is illegal for an employer to retaliate against an employee for filing a grievance pursuant to a CBA, *N.L.R.B. v. City Disposal Systems Inc.*, 465 U.S. 822, 835–36 (1984), such litigation would involve substantial time and money for an uncertain outcome.

v Summary judgment is "[a] judgment granted on a claim or defense about which there is no genuine issue of material fact and on which the movant is entitled to prevail as a matter of law." Black's Law Dictionary (9th ed. 2009).

w Common law refers to "[t]he body of law derived from judicial decisions, rather than from statutes or constitutions." Black's Law Dictionary (9th ed. 2009). The concept of "preemption" is "[t]he principle (derived from the Supremacy Clause [of the Constitution]) that a federal law can supersede or supplant any inconsistent state law or regulation." *Id.*

the suspension of membership.⁷⁷ Moreover, the AFCA typically does not go that far.^x Each year, the AFCA's Committee on Ethics meets at the AFCA's annual convention and reviews recent charges brought by the National Collegiate Athletic Association (NCAA) for violations of NCAA Bylaws and which involve college football coaches. The AFCA generally does not discipline the coaches involved in any way, and instead issues generic aspirational statements recommending and reminding coaches to be ethical and to follow NCAA Bylaws. Additionally, the AFCA's Committee on Ethics seemingly does not conduct any investigation of its own and only considers cases already adjudicated by the NCAA.

x The AFCA provided us copies of its Ethics Committee Reports from 2006 to 2015.

Finally, of the most relevance, the AFCA does not undertake to investigate or discipline NFL coaches for any violations of the AFCA's Code of Ethics, instead deferring to the NFL to handle such matters.⁷⁸ For these reasons the AFCA route for enforcing the legal and ethical obligations of the coach seems anemic.

Currently, the only enforcement of coaches' obligations concerning player health tends to be discipline by the NFL. It is thus suspect whether current practices and the current enforcement scheme are sufficiently protective of player health.

Currently, the only enforcement of coaches' obligations concerning player health tends to be discipline by the NFL. It is thus suspect whether current practices and the current enforcement scheme are sufficiently protective of player health.



(F) Recommendations Concerning Coaches

Coaches have tremendous influence over a player's career and can make decisions or dictate policies or culture that have a substantial impact on a player's health. Many coaches develop close relationships with players, or are former players themselves, and are thus sensitive to protecting player health. Nevertheless, the inherent pressures of coaching sometimes cause coaches to make decisions or create pressures that are not in the best interests of player health. Unfortunately, when things go wrong, there are currently few, if any, fruitful avenues for players to pursue complaints against coaches related to their health. While we were unable to interview current coaches to gauge their viewpoints,^y we make the below recommendations to help improve the role of coaches in player health.

Goal 1: To hold coaches accountable for their role in player health.

Principles Advanced: Respect; Health Primacy; and, Justice.

Recommendation 9:1-A: The NFLCA should adopt and enforce a Code of Ethics that recognizes that coaches share responsibility for player health.

Codes of ethics provide important guidelines and instructions for a wide variety of professionals to ensure that they are conducting themselves in an appropriate and ethical manner. Currently, there is no code of ethics actively governing NFL coaches, which can and does allow for serious lapses concerning player health. To resolve the ethical void for NFL coaches, there are seemingly three options.

First, the AFCA could take a more active role in NFL coaching matters, including enforcing its code of ethics against NFL coaches who are members of the AFCA. However, the AFCA's focus on college coaches and issues seems appropriate and it would likely be better if there were an organization solely focused on NFL coaches.

Second, if the AFCA is not well-suited to regulate NFL coaches, the NFLCA should be. The NFLCA seemingly has minimal resources and employees and engages in limited work. This seems to be a missed opportunity not only to advance the interests of NFL coaches but, also for our concerns here, to ensure the proper involvement of coaches in the lives and health of their players. Thus our preferred solution and the one we recommend here is that the NFLCA evolve into a more robust and active organization, including the self-regulation of its coaches.

Third, in addition to self-regulation, if the NFLCA is unable or unwilling to take on the role of enforcing the ethical obligations of its coaches, the next best option is likely for such obligations to be included in the CBA. It would be preferable if coaches and the NFLCA voluntarily undertook to recognize and clarify their responsibilities, but if they do not, the NFLPA should seek to have such responsibilities outlined in the CBA—a change the NFL should appreciate and willingly accept.

A code of ethics for NFL coaches should cover at least the following topics: coaches' obligations to players, including to help support players in preparation for post-football life; coaches' obligations to other players; communications with medical staff; use of player medical information; and, handling conflicts of interest, including winning and player health. Below, we elaborate on some of these issues.

- **Coaches should establish a locker room culture in which players and their health and safety are respected.** Coaches' influence in the locker room cannot be understated—they set the tone and culture for the organization and players respond and comport themselves according to the culture preferred by the coaches. To that end, if the coaches create a locker room centered around toughness

^y As described more fully in the Introduction, Section 2(B): Description, citing ongoing litigation and arbitration, the NFL declined to consent to our request to interview persons currently employed by or affiliated with NFL clubs, including coaches, general managers, doctors and athletic trainers. Therefore, we did not pursue interviews with these individuals.

Recommendations Concerning Coaches – continued

and where playing through injuries is required, players are likely to make decisions that negatively affect their health. Moreover, such decisions could negatively affect the club if the player returns to play too soon and worsens his injury, requiring him to miss even more playing time. Ideally, coaches will respect a player's medical condition and his right to be treated in a way that is in the player's best interests.

- **Coaches should orient communications with players about their health so as not to create undue pressure on the player where it may be detrimental to player health.^z** Players are under incredible pressure to play and to play well. They know that coaches control their careers in many respects and thus feel intense pressure to impress the coaches, including their ability to play through injuries. Questions and comments from coaches such as, “How are you feeling?” “Are you good to go today?” or “You know we really need you out there” carry the implications that the player must be ready to play and perform, regardless of the player's actual health status.^{aa} We recognize that such questions from coaches might come from genuine concern and that we want players and coaches to establish a meaningful relationship in this regard. Nevertheless, coaches should also recognize the implicit pressures created by these types of comments. Additionally, coaches cannot be faulted for later using the information conveyed by the player in considering the player's roster status, whether in the short or long term. Consequently, coaches should approach conversations with players concerning their health with sensitivity and the players' potential concerns in mind.
- **Coaches should consider, respect and care about players' post-career lives while the player is playing for that coach.** Although the NFL and NFLPA disagree as to the average length of an NFL player's career, it is undeniably short—somewhere in the three to six year range.⁷⁹ Thus the average NFL player will be out of the NFL well before his 30th birthday. And although NFL player salaries are relatively substantial, few, if any, NFL players could reasonably be expected to live another 50 to 60 years on the income earned in their 20s. Almost all players will need to find a career after football. Coaches and club executives should actively encourage their players to consider their post-career options and provide them the flexibility to further their post-career options where it does not undermine the player's and coach's commitment to winning.^{ab}
- **Coaches should not encourage in any way the injury of opposing players.** While the exact details of the New Orleans Saints' “pay-for-performance”/“bounty” system are unclear and debated, the situation did bring into focus the possibility that NFL coaches, in their attempts to motivate their players, might occasionally use language that promotes or suggests that players should attempt to injure their opponents, or go even further to encourage such behavior. Even if such language is hyperbole or overheated rhetoric, players may take such words literally as part of their enthusiasm for the game and in an effort to please their coaches. Moreover, it is the coaches' obligation to ensure that their players play and conduct themselves within the rules. Language tending to promote the injury of opposing players does not serve this obligation and threatens the safety of players.
- **Coaches should ensure that the medical staff acts independently and does not feel pressured to act in any way other than in the player's best interests.** Coaches are not medical professionals and thus are not qualified to opine on a player's medical condition or treatment course. Historically, at least some coaches have unduly influenced club doctors, clubs, and players to take actions that might jeopardize the player's health for the sake of winning. Such actions violate the player's right to a doctor concerned with his best interests and unfairly take advantage of players' (and perhaps also the club doctor's) eagerness to win the approval of their coaches. In order to prevent these situations, clubs and coaches should provide the medical staff the latitude to provide medical care to the players without influence from non-medical staff. Fortunately, there is reason to believe coaches are largely uninvolved in player health decisions today, but a clear ethical rule prohibiting any such involvement is still necessary to avoid these dangerous situations.

z As is explained in Chapter 2: Club Doctors, we recommend that information about player health be relayed to coaches through a summary form known as the Player Health Report. This approach minimizes some of the concerns explained in this Section.

aa Current Player 9: “A lot of time the coaches can't help themselves but to throw little comments about, ‘When can we have you back,’ ‘how do you feel.’ And sometimes they're honest questions, but a lot of times they are probing questions because they want to know when they're going to get that player back . . . I hate it when I hear a coach ever making light of an injury ‘this is not something serious enough to keep somebody out,’ or whenever they try to challenge someone's manhood so to speak and their toughness. Those just are things that don't need to be said.”

ab For example, during the 2014 season, Chicago Bears head coach Marc Trestman approved of star wide receiver Brandon Marshall flying back to New Jersey each Tuesday to tape the television program “Inside the NFL.” Trestman stated: “I trust Brandon . . . He asked me about it. I trust him to make decisions that are in the best interests of the team first. I know Brandon. I know he'll do that. So I have complete faith that the team always comes first, football has always come first to him, and I believe he'll work it out to where it won't distract him from doing his job.” Bob Wolfley, *Bears' Coach Marc Trestman Approves of Brandon Marshall's 'Inside the NFL' Gig*, SportsDay with Bob Wolfley Blog (Aug. 18, 2014), <http://www.jsonline.com/blogs/sports/271721501.html>, archived at <http://perma.cc/4N68-3ENY>.

Recommendations Concerning Coaches – continued

- **Coaches' interests in winning should not supersede player health.** While coaches have legitimate interests in winning, and face tremendous pressure to do so, those interests cannot cause coaches to act in such a way that jeopardizes player health. We recognize it is difficult to determine at what point a player's health, whether short- or long-term, becomes jeopardized and that coaches are not medical professionals. Consequently, if the above-bulleted recommendations concerning the independence of the medical staff are followed, coaches should be free from concerns about player health and can focus solely on winning. To the extent coaches are still in a position to affect player health, they should immediately involve the proper medical staff to ensure that the situation is handled with the appropriate expertise and care.

In order for the recommended NFLCA Code of Ethics to be effective, all NFL coaches must be members of the NFLCA. While it is unclear whether or not all coaches currently are members, it might be necessary for the CBA to require that all coaches be members or otherwise be bound by the proposed Code of Ethics.

Finally, enforcement is essential. Violations of a professional code of ethics should include meaningful punishments, ranging from warnings and censures to fines and suspensions. Again, in order to be effective, the enforcement and disciplinary schemes might need to be included in the CBA.

Recommendation 9:1-B: The most important ethical principles concerning coaches' practices concerning player health should be incorporated into the CBA.

As discussed above, professional self-regulation is important and useful. However, professional codes often fail to be sufficiently enforced. Additionally, player health and coaches' obligations towards player health are too important to leave in the hands of coaches alone. In particular, it currently seems unlikely that the NFLCA has the resources to adopt and enforce a meaningful code of ethics. Consequently, incorporating at least some of the above-mentioned ethical concepts, particularly those concerning player health primacy, into the CBA is likely necessary, along with appropriate enforcement mechanisms.

Recommendation 9:1-C: Coaches should consider innovative ideas and methods that might improve player health.

Helmet-to-helmet hits are a leading cause of concussions.⁸⁰ As a result, the NFL has increasingly penalized such hits while also emphasizing safer tackling methods, which reduce helmet-to-helmet contact. To reinforce those safer tackling methods, the University of New Hampshire football team occasionally practices tackling without helmets.⁸¹ Players believed that the drills helped them to learn how to tackle by using their chest and legs as opposed to their heads.⁸² Similarly, NFL coaches and players should consider whether new practice drills can be implemented that might improve player health.

For example, in 2015, Dartmouth College's football team also introduced a new practice component designed to improve player health. Engineering students at the college created motorized tackling dummies that players can tackle during practice, as opposed to other players.⁸³ Indeed, in 2016, the Pittsburgh Steelers began using a motorized tackling dummy.⁸⁴ Moreover, based in part on Dartmouth College's new tackling dummy, in 2016, the Ivy League banned full-contact hitting and tackling during regular season practices.⁸⁵ Such innovations should continue to be studied and, if successful, might also prove useful to NFL coaches and players and thus should be considered.

Additionally, it would likely be helpful if coaches had a forum in which to share innovative ideas and methods that might improve player health. Nevertheless, we acknowledge that coaches are likely to have concerns about sharing information they might regard as a competitive advantage with other clubs.

Endnotes

- 1 E-mail from Vince Thompson, AFCA, Director of Media Relations, to author (Apr. 5, 2016, 2:31 PM) (on file with authors).
- 2 See Paul Woody, *NFL Coaching Not a Healthy Occupation*, Richmond Times Dispatch, Dec. 18, 1998, available at 1998 WLNR 1242844.
- 3 See Nate Ulrich, *Pettine's New Boys*, Akron Beacon Journal, Mar. 27, 2014, available at 2014 WLNR 8435196; Rainer Sabin, *Cowboys Blog: Garrett's Message of Toughness Being Heeded by Cowboys*, Dall. Morning News, Sept. 24, 2011, available at 2011 WLNR 19451135; *Lions Hire Marinelli Tampa Bay Assistant Brings Toughness to Wayward Team*, Detroit News, Jan. 19, 2006, available at 2006 WLNR 25099694; Larry Weisman, *Athletes Victims of Culture That Likes Its Heroes Tough*, USA Today, May 16, 1996, available at 1996 WLNR 2832770; Larry Weisman, *In NFL, Pain is Part of the Game*, Seattle Times, May 26, 1996, available at 1996 WLNR 1342239.
- 4 Christopher R. Deubert, Glenn M. Wong & Daniel Hatman, *National Football League General Managers: An Analysis of the Responsibilities, Qualifications, and Characteristics*, 20 Jeffrey S. Moorad Sports L.J. 427, 477 (2013) (identifying head coaches who also held general manager/personnel decision responsibilities).
- 5 Final Decision on Appeal, *In the Matter of New Orleans Saints Pay-for-Performance/"Bounty,"* at 16–17 (Tagliabue, Arb. Dec. 11, 2012).
- 6 CBA, Art. 24, § 1(d).
- 7 See *How to Become an NFL Strength and Conditioning Coach*, Sports Rehab and Performance Group, Feb. 28, 2014, <http://sportsrehabandperformancegroup.org/?p=494>, archived at <http://perma.cc/U6E4-C7V5> (interview with Cincinnati Bengals strength and conditioning coach Ron McKeefery about the role of a strength and conditioning coach); Mike Vandermause, *Green Bay Packers Assistant Strength and Conditioning Coach Dave Redding Played 'Big Role' in Success*, Green Bay Press-Gazette, Feb. 23, 2011, available at 2011 WLNR 3564295 (discussing role of NFL strength and conditioning coach); Allen Wilson, *By the Power Vested in Him . . . Strength and Conditioning Coach Allaire Helps Bills Meet Fitness Goals for the Long Season*, Buffalo News, Oct. 15, 2006, available at 2006 WLNR 17952756 (same); Mike Preston, *Bigger, Faster, Stronger: Fitness: Looking to Protect Their Investment in Players, NFL Teams Put Their Stock and Faith In Year-Round Strength and Conditioning Programs*, Balt. Sun, Sept. 20, 1996, available at 1996 WLNR 923238 (same); Thomas George, *Strength and Conditioning Coaches: The Force Is With Them*, N.Y. Times, Jun. 27, 1993, <http://www.nytimes.com/1993/06/27/sports/pro-football-strength-and-conditioning-coaches-the-force-is-with-them.html> archived at <http://perma.cc/QH9X-FH25> (same).
- 8 See *id.*
- 9 See *id.*
- 10 See *How to Become an NFL Strength and Conditioning Coach*, *supra* note 7.
- 11 *American Football Coaches Association – Who We Are*, Am. Football Coaches Ass'n (Sept. 22, 2014), <http://www.afca.com/article/article.php?id=1135>, archived at <http://perma.cc/EKL5-KNUL>. The AFCA's Executive Director is former Baylor head coach and College Football Hall of Famer Grant Teaff.
- 12 See *Amway Coaches Poll*, USA Today, <http://www.usatoday.com/sports/ncaaf/polls/> (last visited May 18, 2016), archived at <https://perma.cc/GZ9A-JCU6> (explaining the AFCA's involvement in the polls).
- 13 See *Pitt State Football: Gorillas Hire NFL All-Pro Gordon*, Morning Sun (Pittsburg, KS), July 25, 2013, available at 2013 WLNR 18347003 (NFL, NCAA and AFCA collaborated to create coaching intern program); William C. Rhoden, *N.F.L. Crosses A Boundary In the Pryor Case*, N.Y. Times, Aug. 21, 2011, <http://www.nytimes.com/2011/08/22/sports/football/ Pryor-case-highlights-nfls-uncomfortably-cozy-ties-with-ncaa.html>, archived at <http://perma.cc/5X78-DJWC> (NFL, NCAA and AFCA collaborated on efforts to prevent student-athletes from losing their eligibility); *Slive: SEC Will Talk On Agents, Rosters, Rules*, Birmingham News (AL), April 19, 2011, available at 2011 WLNR 7702131 (NFL, NCAA and AFCA collaborated on efforts to curtail unethical agents).
- 14 See *AFCA Board of Trustees*, Am. Football Coaches Ass'n (Sept. 22, 2014), <http://www.afca.com/article/article.php?id=5>, archived at <http://perma.cc/S9UA-E8VT>. The Trustees entering the 2015 season were Todd Berry, University of Louisiana-Monroe, First Vice President; Lee Owens, Ashland University, Second Vice President; Rich Rodriguez, University of Arizona, Third Vice President; Bill Cronin, Georgetown College; Frank Solich, Ohio University; Mike Riley, Oregon State University; Gary Patterson, TCU; David Bailiff, Rice University; Mark Richt, University of Georgia; Pete Fredenburg, University of Mary Hardin-Baylor; Turner Gill, Liberty University; Pat Fitzgerald, Northwestern University; Craig Bohl, University of Wyoming; Bronco Mendenhall, Brigham Young University; Todd Knight, Ouachita Baptist University; David Cutcliffe, Duke University; Dale Lennon, Southern Illinois University; Bobby Kennedy, University of Iowa; Dino Babers, Bowling Green State University; and, w Sam Knopik, The Pembroke Hill School (Mo.).
- 15 Amicus Brief of the National Football League Coaches Association in Support of Petitioner, *American Needle, Inc. v. Nat'l Football League*, 560 U.S. 183 (2010) (No. 08-661), 2009 WL 3143713, at *1.
- 16 Mike Florio, *Cornwell Named NFLCA Executive Director*, ProFootballTalk (Feb. 21, 2012, 5:03 PM), <http://profootballtalk.nbcsports.com/2012/02/21/cornwell-named-nflca-executive-director/>, archived at <http://perma.cc/3SGB-ZTQT>; see also Barnes & Thornburg, LLP Directory: David Cornwell Sr., <http://www.btlaw.com/david-cornwell/> (last visited Aug. 7, 2015), archived at <http://perma.cc/7GF8-V7MV>, (discussing Cornwell's ongoing legal practice outside of his duties at the NFLCA).
- 17 CBA, Art. 21.
- 18 CBA, Art. XXV.
- 19 CBA, Art. 21, § 8.
- 20 CBA, Art. 22, § 1.
- 21 CBA, Art. 22, § 2.
- 22 CBA, Art. 22, § 5.
- 23 CBA, Art. 22, § 8.
- 24 CBA, Art. 22, § 9.
- 25 CBA, Art. 23, § 5.
- 26 CBA, Art. 23, § 6.
- 27 CBA, Art. 23, § 10.
- 28 CBA, Art. 23, § 11.
- 29 CBA, Art. 24, § 1(a), (b).
- 30 CBA, Art. 24, § 1(d).
- 31 CBA, Art. 24, § 2.
- 32 CBA, Art. 24, § 4.
- 33 CBA, Art. 24, § 3.
- 34 CBA, Art. 35.
- 35 *AFCA Code of Ethics Summary*, Am. Football Coaches Ass'n (Sept. 22, 2014), <http://www.afca.com/article/article.php?id=8>, archived at <http://perma.cc/KJ49-N68E>. The complete Code of Ethics can be obtained by contacting the AFCA.
- 36 *Id.*
- 37 *Id.*
- 38 *Id.*
- 39 See, e.g., Michael David Smith, *Chip Kelly, Earl Wolff not seeing eye to eye on recovery from injury*, ProFootballTalk (Jun. 10, 2015, 12:06 PM), <http://profootballtalk.nbcsports.com/2015/06/10/chip-kelly-earl-wolff-not-seeing-eye-to-eye-on-recovery-from-injury/>, archived at <http://perma.cc/Z7P6-JCKQ> (Philadelphia Eagles head coach Chip Kelly publicly stating that the only thing holding a player back from participating in practice was pain tolerance); Josh Alper, *Marvin Lewis: Marvin Jones has to "find a way to get out there,"* ProFootballTalk (Aug. 7, 2015, 9:41 AM), <http://profootballtalk.nbcsports.com/2015/08/07/marvin-lewis-marvin-jones-has-to-find-a-way-to-get-out-there/>, archived at <http://perma.cc/8YBW-4GRP>.

- 40 Rick Stroud, *Thomas Catches On Again*, St. Petersburg Times (FL), Sept. 18, 1998, available at 1998 WLNR 2608915.
- 41 Mark Fainaru-Wada & Steve Fainaru, *League of Denial: The NFL, Concussions, and the Battle for Truth* 80 (2013).
- 42 Adam H. Beasley, *Dolphins' Gase challenges Parker to do what it takes to stay on the field*, Miami Her., Aug. 30, 2016, <http://www.miamiherald.com/sports/nfl/miami-dolphins/article98878327.html>, archived at <https://perma.cc/6E6P-9RBT>.
- 43 Mike Florio, *NFL really is doing a better job of spotting concussions*, ProFootballTalk (Dec. 1, 2015, 9:19 AM), <http://profootballtalk.nbcsports.com/2015/12/01/nfl-really-is-doing-a-better-job-of-spotting-concussions/>, archived at <http://perma.cc/BPN9-E64P>.
- 44 See Christopher R. Deubert, *A Summary of the NFL's Investigation Into the New Orleans Saints Alleged Bounty Program and Related Proceedings*, 9 DePaul J. Sports L. & Contemp. Probs. 123 (2013).
- 45 *Id.*
- 46 *Id.*
- 47 Sean Payton Proud of Saints, ESPN (Sept. 5, 2012), http://espn.go.com/nfl/story/_/id/8339699/sean-payton-expects-new-orleans-saints-do-well-him, archived at <http://perma.cc/3QEB-A4R4>.
- 48 See Deubert, *supra* note 44.
- 49 *Id.*
- 50 *Id.*
- 51 *Id.* See Final Decision on Appeal, *In the Matter of New Orleans Saints Pay-for-Performance/"Bounty"* (Tagliabue, Arb. Dec. 11, 2012).
- 52 *Id.*
- 53 The Wells Report is available from a variety of online sources, most reliably the Sports Lawyers Association, www.sportslaw.org (membership required).
- 54 Turner's response can be found at http://espn.go.com/pdf/2014/0911/turner-response_r.pdf, archived at <https://perma.cc/74B3-78AT?type=pdf>.
- 55 See 2011 CBA, Art. 43, § 1.
- 56 See 2011 CBA, Art. 43, § 6 (discussing constitution of Arbitration Panel); 2011 CBA, Art. 43 § 8 (discussing Arbitrator's authority, including to grant a "money award").
- 57 See *Jackson v. Kimel*, 992 F.2d 1318, 1325 n.4 (4th Cir. 1993) (collecting cases holding that employees that are not signatories to the CBA cannot be sued for violations of the CBA).
- 58 See 2011 CBA, Art. 2, § 2 (generally discussing CBA's binding effect on NFL, NFLPA, players and Clubs but no other party).
- 59 See Alexander Cornwell, *Trapped: Missouri Legislature Seeks to Close Workers' Compensation Loophole with Some Co-Employees Still Inside*, 77 Mo. L. Rev. 235, 235 (2012); David J. Krco, *Case Note: Torts – Narrowing the Window: Refining the Personal Duty Requirement for Coemployee Liability Under Minnesota's Workers' Compensation System – Stringer v. Minnesota Vikings Football Club, LLC*, 33 Wm. Mitchell L. Rev. 739, 739 (2007); John T. Burnett, *The Enigma of Workers' Compensation Immunity: A Call to the Legislature for a Statutorily Defined Intentional Tort Exception*, 28 Fla. St. U. L. Rev. 491, 497 (2001).
- 60 See *Lotysz v. Montgomery*, 309 A.D.2d 628 (N.Y. App. Div. 2003) (NFL player's medical malpractice claim against club doctor barred by state workers' compensation statute); *Daniels v. Seattle Seahawks*, 968 P.2d 883 (Wash. Ct. App. 1998); *Hendy v. Losse*, 819 P.2d 1 (Cal. 1991). See also *Bryant v. Fox*, 515 N.E.2d 775 (Ill. App. Ct. 1987) (NFL player's medical malpractice claim against Club doctor not barred by workers' compensation statute where evidence established that doctor was an independent contractor). For more information on the possibility of players suing coaches, see Timothy Davis, *Tort Liability of Coaches for Injuries to Professional Athletes: Overcoming Policy and Doctrinal Barriers*, 76 UMKC L. Rev. 571 (2008).
- 61 CBA, Art. 43, § 2.
- 62 Mike Florio, *Report of Richard Sherman Minicamp Fight Sparked NFLPA Investigation*, ProFootballTalk (Aug. 27, 2014), <http://profootballtalk.nbcsports.com/2014/08/27/report-of-richard-sherman-minicamp-fight-sparked-nflpa-investigation/>, archived at <http://perma.cc/Y4RT-D8XW>. See also 2011 CBA, Art. 22, § 8 (discussing NFLPA's rights to films from minicamps).
- 63 Chris Mortensen, *NFL Fines Pete Carroll, Seahawks*, ESPN (Aug. 26, 2014 8:00 PM), http://espn.go.com/nfl/story/_/id/11414018/seattle-seahawks-pete-carroll-...1, archived at <http://perma.cc/46ZR-HWX7>.
- 64 *Id.*
- 65 See Glenn M. Wong, *Essentials of Sports Law*, § 4.2 (4th ed. 2010) (discussing liability of coaches and gathering cases).
- 66 *Stringer v. Minnesota Vikings Football Club, LLC*, 705 N.W.2d 746, 748 (Minn. 2005).
- 67 See Memorandum and Order, *Stringer v. Minnesota Vikings Football Club, LLC*, No. 02-415 (Minn. Dist. Ct. Apr. 25, 2003); *Stringer v. Minnesota Vikings Football Club, LLC*, No. 02-415, 2003 WL 25766738 (Minn. Dist. Ct. Dec. 8, 2003) (discussing Court's prior order). Following *Stringer's* death, the NFL now issues an annual memorandum to NFL Clubs warning them about the risks of players overheating during training camp. See, e.g., Memorandum from NFL Injury and Safety Panel (Elliott Hershman, M.D., Chairman), to General Managers, Head Coaches, Team Physicians, and Team Athletic Trainers re: 2014 Training Camps – Adverse Weather Conditions (July 11, 2014) (on file with author).
- 68 See Memorandum and Order, *Stringer v. Minnesota Vikings Football Club, LLC*, No. 02-415, 71–76 (Minn. Dist. Ct. Apr. 25, 2003).
- 69 U.S.C. § 185.
- 70 *Allis-Chambers Corp. v. Lueck*, 471 U.S. 202, 213, 200 (1985).
- 71 See, e.g., *Givens v. Tennessee Football, Inc.*, 684 F. Supp. 2d 985 (M.D. Tenn. 2010) (player's tort claims against Club arising out of medical treatment preempted); *Williams v. Nat'l Football League*, 582 F.3d 863 (8th Cir. 2009) (players' tort claims arising out of drug test preempted).
- 72 *Smith v. Houston Oilers, Inc.*, 87 F.3d 717 (5th Cir. 1996).
- 73 *Id.*
- 74 *Id.*
- 75 AFCA Code of Ethics at p. 9.
- 76 *Id.* at 9–10.
- 77 *Id.* at 10.
- 78 E-mail from Vince Thompson, Director of Media Relations, AFCA, to Christopher R. Deubert (Feb. 26, 2015).
- 79 See *Average NFL Career Length*, Sharp Football Analysis, Apr. 30, 2014, <http://www.sharpfootballanalysis.com/blog/?p=2133>, archived at <http://perma.cc/X8QV-77A3> (discussing disagreement between NFLPA and NFL about average career length and determining that the average drafted player plays about 5 years).
- 80 At Super Bowl XLIX, the NFL presented data showing that between 2012 and 2014 that helmet-to-helmet hits were responsible for 49.7% of concussions. The next most likely cause was the playing surface, which accounted for only 12.9% of concussions. See *Super Bowl XLIX Health & Safety Press Conference*, NFL (May 1, 2015), <http://static.nfl.com/static/content/public/photo/2015/01/29/0ap3000000465343.pdf>, archived at <https://perma.cc/8GV6-JJ7W?type=pdf>.
- 81 Jenny Ventras, *Helmetless Football? It's the New Practice at New Hampshire*, Sports Illustrated, Dec. 4, 2014, <http://mmqb.si.com/2014/12/04/helmetless-football-practice-university-of-new-hampshire/>, archived at <http://perma.cc/6CBB-8Y5J>.
- 82 *Id.*
- 83 Holly Ramer, *In bid to reduce concussions, Dartmouth debuts remote-controlled tackling dummy*, U.S. News & World Report (Aug. 26, 2015 1:16 PM), <http://www.usnews.com/news/sports/articles/2015/08/26/tackling-goes-high-tech-at-dartmouth>, archived at <http://perma.cc/2UXD-LB4K>.
- 84 Josh Alper, *Steelers experimenting with robots in practice*, ProFootballTalk (May 20, 2016, 7:28 AM), <http://profootballtalk.nbcsports.com/2016/05/20/steelers-experimenting-with-robots-in-practice/>, archived at <https://perma.cc/TBD2-NLEX>.
- 85 Ken Belson, *Ivy League Moves to Eliminate Tackling at Football Practices*, N.Y. Times, Mar. 1, 2016, <http://www.nytimes.com/2016/03/02/sports/ncaafootball/ivy-league-moves-to-eliminate-tackling-at-practices.html>, archived at <https://perma.cc/24W6-VKG2>.



Chapter 10

Club Employees



This chapter discusses the roles of NFL club general managers (often referred to as “GMs”), developmental staff, and scouts. Each of these employees has involvement with players at key moments in players’ careers. For example, as will be explained further below, general managers draft, sign, and release players; developmental staff help players after they have been drafted; and scouts gather as much information as possible on players. Consequently, these club employees have the potential to influence player health in important ways.

Before we begin our analysis, it is important to point out that throughout this chapter we emphasize that the practice of club employees is likely heterogeneous from club to club at least to some extent. Nevertheless, we were unable to interview club employees as part of this report to gain a better understanding of their work. In November 2014, we notified the NFL that we intended to seek

interviews with club personnel, including general managers, coaches, doctors, and athletic trainers. The NFL subsequently advised us that it was “unable to consent to the interviews” on the grounds that the “information sought could directly impact several lawsuits currently pending against the league.” Without the consent of the NFL, we did not believe that the interviews would be successful and thus did not pursue the interviews at that time; instead, we have provided these stakeholders the opportunity to review draft chapters of the Report. We again requested to interview club personnel in July 2016 but the NFL did not respond to that request. The NFL was otherwise cooperative—it reviewed our Report and facilitated its review by club doctors and athletic trainers. The NFL also provided information relevant to this Report, including but not limited to copies of the NFL’s Medical Sponsorship Policy (discussed in Chapter 2: Club Doctors) and other information about the relationships between clubs and doctors. Nevertheless, the NFL did not facilitate review of this chapter by any of the types of club employees discussed: general managers; developmental staff; and, scouts.

(A) Background

1) GENERAL MANAGERS

NFL general managers by and large are the persons responsible for every aspect of the club. General managers report directly to the club’s owner and are responsible for putting together a cohesive and well-functioning organization that wins on the field and is maximally profitable off of it. To that end, general managers handle some of the most important football-related tasks, such as hiring the coach and making player personnel decisions, but also a variety of non-football specific tasks, including overseeing and directing the financials, human resources, marketing, stadium development, and media and community relations.¹ Additionally, general managers come from a variety of career paths, including many who played in either college and/or the NFL. Generally, about two-thirds of general managers played college football and about a fifth played in the NFL.²

General managers are an integral part of the entire NFL club and thus are an integral part of the process for identifying and addressing player health and welfare matters. General managers are responsible for, or at least intimately involved in, hiring coaches, doctors, athletic trainers and other club staff involved in player health matters.

Perhaps most importantly to the players, general managers make roster decisions affecting the player’s employment

and contract decisions affecting the player’s compensation.^a During the season, clubs are limited to a 53-man roster and general managers are constantly looking to replace injured players with healthy players and underperforming players with better players. It is thus vital that players be seen positively in the eyes of the general manager.

2) DEVELOPMENTAL STAFF

Each NFL club employs someone with the title of Director of Player Development or Director of Player Engagement. These employees are often ex-players who are responsible for assisting the club’s players with a blend of professional and personal issues, including transitioning from college to the NFL, getting the player and his family settled in a new environment, dealing with the media, continuing their education, planning for retirement, and providing general life coaching and guidance.³ As respected elder statesmen of the game, these individuals have the opportunity to play an important role in assisting players and making sure the actions taken are in their best interests.

Nevertheless, the ability of these staff members to have a meaningful impact on the club and players depends on the resources provided and the club’s commitment to player development. For example, in February 2012, the Washington football club hired 15-year veteran defensive end Phillip Daniels as their Director of Player Development.⁴ Daniels left the organization after one season because he felt the club did not take his position or player development seriously.⁵ Daniels never met with head coach Mike Shanahan or General Manager Bruce Allen and said he was not given any financial resources to implement the types of programs he thought would be beneficial to the club’s players and their families.⁶

3) SCOUTS

Quality scouts can also be the core of a successful football team. Each NFL club employs approximately 10 to 15 people in their player personnel/scouting departments. Scouts are separated into two categories: professional and college. Professional scouts are responsible for scouting players on other NFL clubs, while the college scouts fan out across the country and provide scouting reports on thousands of college football players.⁷

Scouts seek out every personal and professional detail on players and thus provide valuable insight to a club when it comes time for personnel decisions. For example, in

a In any given season, there are, however, a handful of head coaches who possess final control over the club’s roster as opposed to the general manager.

addition to how well they play football, scouting reports often include details of family and romantic relationships, academic performance, troubles with the law or coaches, personality profiles, injury history, and perceived toughness and intelligence.^b Scouts often interview the players, their high school and college coaches, college medical staff, and others who know the players to obtain these details.⁸ Scouts then have the power to decide whether to label a prospect as “injury prone” or someone with “bad character.”

Moreover, it is important to note that many NFL clubs share scouting reports through one of two scouting services: National and BLESTO.⁹ Both services employ scouts who provide comprehensive reports to multiple clubs.¹⁰ Consequently, one scout can have a very big impact on a player’s future. It is thus essential that the scout’s information be accurate.

Scouting information can also play an important role once a player joins a club. If a club knows from a scouting report that a player has any particular social issues, such as family, friends or drugs, the club is potentially in a position to effectuate positive change.^c Additionally, if a scouting report reveals that a player suffers or has suffered from a physical ailment of some kind, the club can ensure that the player is treated appropriately. Indeed, out of their own self-interest, clubs are likely to try and provide a player with the support (physical, social, and otherwise) he needs to be a successful football player.

(B) Current Legal Obligations^d

The 2011 CBA contains no provisions specifically addressing the obligations of general managers, developmental staff, or scouts.

The CBA does contain many provisions concerning the responsibilities of clubs. General managers, as the persons at the top of the club’s football hierarchy, are generally responsible for ensuring the clubs’ compliance with its various CBA-identified obligations. Indeed, it is not uncommon for general managers to be fined when a club fails to comply with NFL policies.¹¹

Although scouts and development staff could potentially be complicit in the violation of the CBA or NFL policy, they are under no general obligation to ensure compliance with the CBA or NFL policies.

(C) Current Ethical Codes

There are no ethical codes specific to general managers, developmental staff, or scouts.^e

(D) Current Practices

It is generally believed that general managers have little involvement with player health decisions or treatment, other than in an administrative capacity such as relaying information from the club doctor to the contract advisor or letting the contract advisor know if the player is being placed on Injured Reserve. Moreover, the players we interviewed generally said they have had no relationship with their general managers.^f Some contract advisors believe general managers’ involvement in player health decisions has decreased in the last five years or so, as clubs have looked to avoid conflict and/or liability concerning these issues.^g

General managers are involved with the player’s health to the extent that it affects the club’s roster.^h Athletic trainers and, to a lesser extent, club doctors keep coaches and general managers apprised of players’ injury status during weekly meetings so the general manager can make a decision about whether or not to sign another player in the

^b One scout described his efforts to obtain information about a college player as follows: “When you arrive at a school, you get there early in the morning and you meet with the football operations director. He gives you background information on the kid: the hometown, their family and those types of things. After that, you’ll go to a film room and watch tape for the biggest part of the day. You meet with the strength coach. You meet with an academic advisor that gives you some background on the player’s performance in those areas. You meet with the trainer to see if they have ever been injured, how their rehab habits are. Then you go to practice. You get a feel for their effort in practice, how hard they work and that type of thing.” See John Zernhelt, *Scout’s Tales: Aaron Donald*, St. Louis Rams (Mar. 27, 2015), <http://www.stlouisrams.com/news-and-events/article-1/Scouts-Tales-Aaron-Donald/910aff46-e2cd-49d5-8a7a-45814fa773de>, archived at <http://perma.cc/VSJ6-4Q7L>.

^c For example, when the Dallas Cowboys drafted wide receiver Dez Bryant in the first round of the 2010 NFL Draft, after Bryant’s college career had ended in suspension, the Cowboys and Bryant negotiated a set of regulations concerning Bryant’s off-field activities and provided Bryant with a three-man security team. Josh Alper, *Cowboys Enact Set of Behavioral Rules for Dez Bryant*, ProFootballTalk (Aug. 26, 2012, 12:07 PM), <http://profootballtalk.nbcsports.com/2012/08/26/cowboys-enact-set-of-behavioral-rules-for-dez-bryant/>, archived at <http://perma.cc/6LFT-XYFL>.

^d The legal obligations described herein are not an exhaustive list but are those we believe are most relevant to player health.

^e If any of these club employees were licensed in some other way, they might have additional obligations.

^f Current Player 7: “For the most part, the General Managers are up in the office. We don’t really see them, or the owners.” Current Player 8: “[T]he top 10 to 20 percent on each team, I think, have a passing relationship with [the General Manager], or some may have more but, again, this is going into my eighth year and I’ve never had a relationship with any General Manager.”

^g Contract Advisor 1: “I think in the last five to seven years, the coaches and general managers have taken a step back from the medical component. There’s too much risk and owners have probably told them . . . why would you do this, not to mention for the most part, general managers are not interested in having players get hurt on their watch more severely than they needed to be.” Contract Advisor 6: “[V]ery few general managers have a clue. They rely strictly on their medical staff. So they don’t really spend a lot of time [dealing with player health issues].”

^h Former Player 3: “I think general managers are probably better than coaches at looking at the long view [on player health] because they have a little bit longer shelf life.”

event a player is unable to play.ⁱ Club medical staff keep coaches and general managers apprised of players' injury status during weekly meetings so the general manager can make a decision about whether or not to sign another player in the event a player is unable to play. Players indicated that these meetings place pressures on players to practice to avoid having the athletic trainer tell the general manager that he should consider signing a potential replacement.

Current players often recognize the tenuous nature of their career and that it lays in the hands of the general manager and coaches, as Current Player 1 stated:

[Y]ou like to think that they care about you but I think you kind of realize that it's a business. They're just trying to get the most out of you for as many years as they can [while] they feel that you're still serviceable and productive.

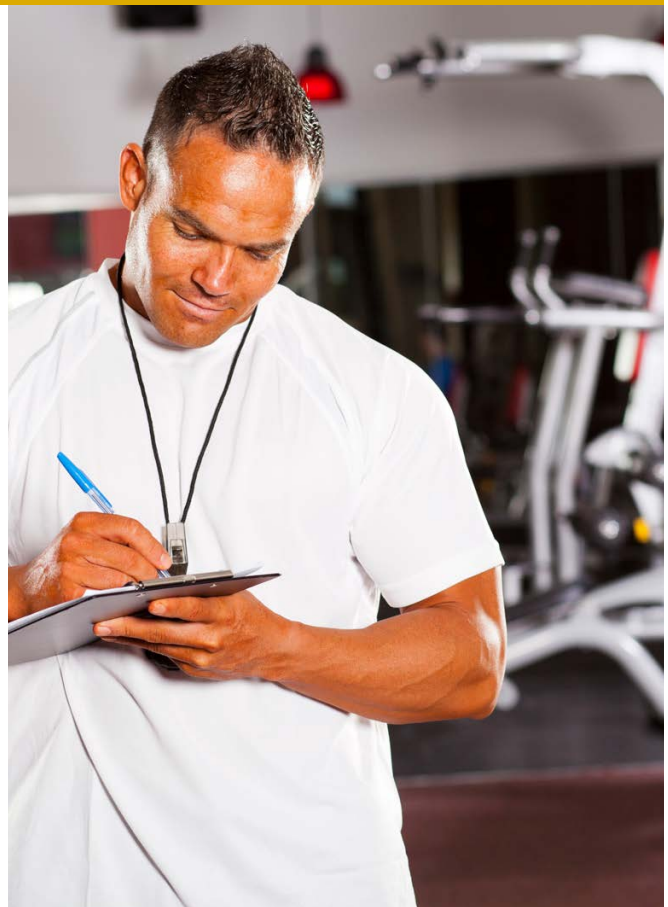
i Current Player 1: "[O]ur head trainer has a meeting with our GM and head coach at least once a week about whatever injuries are going on in the team." Current Player 9: "[General Managers] are in meetings with the head coaches and with the head trainers."

Players indicated that developmental staff is a "great resource" for a player, particularly when he is new to the club or city. The staff is able to get them situated with housing, transportation, and other living necessities. In addition, some players explained that the developmental staff would meet with rookies before the season to try to help them adjust to the NFL and also to understand the realities of the NFL.^j For example, the developmental staff might try to make the player aware of the possible brevity of his career and encourage him to spend his money wisely and to begin to consider life after football. Nevertheless, players also indicated that the development staff is generally far removed from matters concerning player health or the player's status on the club.

Despite the incredible amount of information and data that scouts collect about players, scouts generally do not play any role in player health once the player joins the club.

j Current Player 1: "[W]hen you're a rookie you spend a ton of time with the director of player of development. We have numerous meetings talking about how to spend your money, how to deal with family relationships now that you're in the NFL, [and] how to deal with outside influences. He really helps you to develop[.]" Current Player 8: "I think that the player development guy on each team assists the young guys in kind of the mental and social changes that they have to go through."

Club medical staff keep coaches and general managers apprised of players' injury status during weekly meetings so the general manager can make a decision about whether or not to sign another player in the event a player is unable to play.



(E) Enforcement of Legal and Ethical Obligations^k

In the event a player or the NFLPA believes a club employee has violated his obligations to the players, the player could try to commence a Non-Injury Grievance in accordance with the CBA.^l The 2011 CBA directs certain disputes to designated arbitration mechanisms^m and directs the remainder of any disputes involving the CBA, a player contract, NFL rules, or generally the terms and conditions of employment to the Non-Injury Grievance arbitration process.¹² Importantly, Non-Injury Grievances provide players with the benefit of a neutral arbitration and the possibility of a “money award.”¹³

However, there are several impediments to pursuing a Non-Injury Grievance against a club employee. First and foremost, club employees are not parties to the CBA and thus likely cannot be sued for violations of the CBA.¹⁴ Instead, the player could seek to hold the club responsible for the club employee’s violation of the CBA.¹⁵ Second, the player’s claim might be barred by workers’ compensation statutes. Workers’ compensation statutes provide compensation for workers injured at work and thus generally preclude lawsuits against co-workers based on the co-workers’ negligence.¹⁶ This was the result in the *Stringer* case (discussed in detail in Chapter 9: Coaches), and in multiple cases brought by NFL players against club doctors.¹⁷ It is unclear if or how this bar would apply in an arbitration. Third, Non-Injury Grievances must be filed within 50 days “from the date of the occurrence or non-occurrence upon which the grievance is based,”¹⁸ a timeframe that is much shorter than your typical statute of limitations. And fourth,

players likely fear that pursuing a grievance against a club employee could result in the club terminating him.ⁿ

In addition to workers’ compensation statutes, the CBA also presents a major obstacle for a player suing a club employee. This is because the Labor Management Relations Act (LMRA)¹⁹ bars or “preempts” state common law^o claims, such as negligence, 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” CBA.²⁰ In order to determine whether a club employee was appropriately attentive to a player’s health or welfare needs, the court might have to refer to and analyze the terms of the CBA governing player health, resulting in the claim’s preemption.²¹ Preemption occurs even though club employees are not parties to the CBA and thus likely cannot be a party in any CBA grievance procedure. So long as the player’s claim is “inextricably intertwined” with the CBA, it will be preempted. In these cases, player complaints must be resolved through the enforcement provisions provided by the CBA itself (*i.e.*, a Non-Injury Grievance against the club), rather than through litigation.

In a 1995 lawsuit, two Houston Oilers players alleged that a Houston Oilers general manager and strength and conditioning coach subjected the players to a phony and brutal rehabilitation program designed to coerce the players into quitting the club.²² The players alleged state law claims of coercion, duress, extortion, assault and battery, and intentional infliction of emotional distress. The United States District Court for the Southern District of Texas held that the players’ claims were preempted by the CBA, because the CBA and the players’ contracts governed rehabilitation programs.²³ The United States Court of Appeals for the Fifth Circuit affirmed.²⁴

Currently, the only enforcement of club employees’ obligations concerning player health tends to be discipline by the NFL. It is thus suspect whether current practices and the current enforcement scheme are sufficiently protective of player health.

^k Appendix K is a summary of players’ options to enforce legal and ethical obligations against the stakeholders discussed in this Report. In addition, for rights articulated under either the CBA or other NFL policy, the NFLPA and the NFL can also seek to enforce them on players’ behalves.

^l See 2011 CBA, Art. 43 (discussing Non-Injury Grievance procedures). The term “Non-Injury Grievance” is something of a misnomer. The CBA differentiates between an “Injury Grievance” and a “Non-Injury Grievance.” An Injury Grievance is exclusively “a claim or complaint that, at the time a player’s NFL Player Contract or Practice Squad Player Contract was terminated by a Club, the player was physically unable to perform the services required of him by that contract because of an injury incurred in the performance of his services under that contract.” 2011 CBA, Art. 44, § 1. Generally, all other disputes (except System Arbitrations, *see* 2011 CBA, Art. 15) concerning the CBA or a player’s terms and conditions of employment are Non-Injury Grievances. 2011 CBA, Art. 43, § 1. Thus, there can be disputes concerning a player’s injury or medical care which are considered Non-Injury Grievances because they do not fit within the limited confines of an Injury Grievance.

^m For example, Injury Grievances, which occur when, at the time a player’s contract was terminated, the player claims he was physically unable to perform the services required of him because of a football-related injury, are heard by a specified Arbitration Panel. 2011 CBA, Art. 44. Additionally, issues concerning certain Sections of the CBA related to labor and antitrust issues, such as free agency and the Salary Cap, are within the exclusive scope of the System Arbitrator, 2011 CBA, Art. 15, currently University of Pennsylvania Law School Professor Stephen B. Burbank.

ⁿ Current Player 8: “You don’t have the gall to stand against your franchise and say ‘They mistreated me.’ . . . I, still today, going into my eighth year, am afraid to file a grievance, or do anything like that[.]” While it is illegal for an employer to retaliate against an employee for filing a grievance pursuant to a CBA, *N.L.R.B. v. City Disposal Systems Inc.*, 465 U.S. 822, 835–36 (1984), such litigation would involve substantial time and money for an uncertain outcome.

^o Common law refers to “[t]he body of law derived from judicial decisions, rather than from statutes or constitutions.” Black’s Law Dictionary (9th ed. 2009). The concept of “preemption” is “[t]he principle (derived from the Supremacy Clause [of the Constitution]) that a federal law can supersede or supplant any inconsistent state law or regulation.” *Id.*

(F) Recommendations Concerning Club Employees

NFL club general managers and scouts make important decisions concerning a player's career, often based on a player's current or expected health status. In addition, general managers, scouts, and developmental staff all have unique relationships with players that provide them a unique opportunity to promote player health. Indeed, like coaches, many NFL club employees develop close relationships with players, or are former players themselves, and are thus sensitive to protecting player health. Nevertheless, the inherent pressures of winning and running a successful business can sometimes cause these employees to make decisions or create pressures that negatively affect player health. While we were unable to interview these employees to gauge their viewpoints,^p we make the below recommendations to help improve the role of club employees in player health.

In Chapter 9: Coaches, we recommended that the NFLCA adopt and enforce a Code of Ethics that demands that coaches be responsible for player health. We then highlighted several important ethical concepts or practices for coaches, including that:

- Coaches should establish a locker room culture in which players and their health and safety are respected.
- Coaches should keep communications with players about their health to a minimum.
- Coaches should consider, respect, and care about players' post-career lives.
- Coaches should not encourage in any way the injury of opposing players.
- Coaches should ensure that the medical staff acts independently and does not feel pressured to act in any way other than in the player's best interests.
- Coaches' interests in winning cannot supersede player health.

Each of the above-listed ethical concepts or practices can also be applied to the club employees discussed in this chapter.

Additionally, while we recommended that the NFLCA enact and enforce such a Code of Ethics, we recognized that it might not have the resources or will to do so. Consequently, we recommended that the most important principles concerning coaches' conduct be incorporated into the CBA. Similarly, since there are generally no professional societies governing general managers, developmental staff, or scouts, these principles as applied to those club employees should be incorporated into the CBA.

Below are recommendations more specific to the club employees discussed in this chapter.

Goal 1: To encourage clubs and their employees to advance a culture of health.

Principles Advanced: Respect; Health Primacy; Managing Conflicts of Interest; and, Collaboration and Engagement.

Recommendation 10:1-A: Clubs and club employees, in particular general managers and developmental staff, should take steps to resolve any concerns discovered about a player's health.²⁵

^p As described more fully in the Introduction, Section D(2): Description of Legal and Ethical Obligations, citing ongoing litigation and arbitration, the NFL declined to consent to our request to interview persons currently employed by or affiliated with NFL clubs, including coaches, general managers, doctors, and athletic trainers. Therefore, we did not pursue interviews with these individuals.

Recommendations Concerning Club Employees – continued

Clubs expend considerable effort to learn a great deal of information about players, including their medical, family, intellectual, personality, financial and social issues. These issues can threaten a promising career. Clubs learn about these issues during the pre-Draft process, when considering signing the player as a free agent, and when the player is a member of their club. While clubs are interested in helping players address these issues to protect their investment in the player, clubs should look beyond what might only be short-term solutions that help the player while he is with the club to include longer-term solutions, such as a variety of programs offered by the NFL and NFLPA, that will improve player health over a more extended period of time.

Recommendation 10:1-B: Clubs should adequately support the developmental staff.

Players we interviewed generally spoke well of the effort by developmental staff to assist players, particularly young players. Nevertheless, through these interviews and news articles, it also seems likely that the developmental staff can sometimes be under-resourced and limited in its role. The developmental staff has the potential to be a powerful resource for players, particularly in pointing them to the various programs and benefits offered by the NFL and NFLPA, and helping them through the process of taking advantage of those programs and benefits. By better supporting these staffs and professionalizing their role, clubs can make gains in player health.



Endnotes

- 1 For a discussion of the role of NFL General Managers, see Christopher R. Deubert, Glenn M. Wong & Daniel Hatman, *National Football League General Managers: An Analysis of the Responsibilities, Qualifications, and Characteristics*, 20 Jeffrey S. Moorad Sports L.J. 427 (2013).
- 2 See *id.* at 475 (chart showing playing experience of NFL General Managers in 1992, 2002 and 2012).
- 3 See Mike Chappel, *Ex-Colt Pollard Feeling Blessed*, Indianapolis Star, Jun. 9, 2014, available at 2014 WLNR 15630530 (discussing fourteen-year veteran Marcus Pollard's hiring as the Jacksonville Jaguars Director of Player Development); Conor Orr, *Tyree's Hiring Comes With Controversy, Former WR Blasted For His Personal Views*, Star-Ledger (Newark, NJ), Jul. 23, 2014, available at 2014 WLNR 20130392 (discussing former wide receiver David Tyree's hiring as the New York Giants Director of Player Development).
- 4 Dan Steinberg, *Phillip Daniels Said He Was 'On an Island' When He Worked for the Redskins*, Wash. Post DC Sports Blog (Jun. 30, 2014), <http://www.washingtonpost.com/blogs/dc-sports-bog/wp/2014/06/30/phillip-daniels-said-he-was-on-an-island-when-he-worked-for-the-redskins/>, archived at <http://perma.cc/NZ5K-DW5K>.
- 5 *Id.*
- 6 *Id.*
- 7 See Deubert, *supra* note 1, at 466–72 (discussing composition, purpose and duties of scouting departments).
- 8 Ben Volin, *NFL Teams Go Extra Yard to Vet Prospects Before Draft*, Bos. Globe, Apr. 26, 2015, <http://www.bostonglobe.com/sports/2015/04/25/nfl-teams-homework-including-spying-draft-prospects/I5EIHkWSQBvI6fwvQNVkyl/story.html>, archived at <http://perma.cc/8NNY-GPR3>.
- 9 *Id.* BLESTO stands for Bears, Lions, Eagles and Steelers Talent Organization, although now approximately twelve Clubs use BLESTO.
- 10 Volin, *supra* note 8.
- 11 See *Fall From Grace, Saints Suffer Unprecedented Penalties from NFL for Running Bounty Program*, New Orleans Times Picayune, Mar. 22, 2012, available at 2012 WLNR 6061758 (\$500,000 fine for New Orleans Saints General Manager Mickey Loomis for alleged involvement in bounty program); J.P. Pelzman, *NFL Hits Jets with \$100K Fine*, N.J. Record, Sept. 17, 2009, available at 2009 WLNR 20070367 (\$25,000 fine for New York Jets General Manager Mike Tannenbaum for Club's failure to include injured quarterback Brett Favre in injury report); Mike Freeman, *Pro Football Notebook: Mara Not Blaming Tagliabue*, N.Y. Times, Dec. 17, 2000, <http://www.nytimes.com/2000/12/17/sports/pro-football-notebook-mara-not-blaming-tagliabue.html>, archived at <http://perma.cc/ZP64-WVUP> (\$400,000 fine for San Francisco 49ers General Manager Carmen Policy for Salary Cap violations).
- 12 See 2011 CBA, Art. 43, § 1.
- 13 See 2011 CBA, Art. 43, § 6 (discussing constitution of Arbitration Panel); 2011 CBA, Art. 43 § 8 (discussing Arbitrator's authority, including to grant a "money award").
- 14 See *Jackson v. Kimel*, 992 F.2d 1318, 1325n.4 (4th Cir. 1993) (collecting cases holding that employees that are not signatories to the CBA cannot be sued for violations of the CBA).
- 15 See 2011 CBA, Art. 2, § 2 (generally discussing CBA's binding effect on NFL, NFLPA, players and Clubs but no other party).
- 16 See Alexander Cornwell, *Trapped: Missouri Legislature Seeks to Close Workers' Compensation Loophole with Some Co-Employees Still Inside*, 77 Mo. L. Rev. 235, 235 (2012); David J. Krco, *Case Note: Torts – Narrowing the Window: Refining the Personal Duty Requirement for Coemployee Liability Under Minnesota's Workers' Compensation System – Stringer v. Minnesota Vikings Football Club, LLC*, 33 Wm. Mitchell L. Rev. 739, 739 (2007); John T. Burnett, *The Enigma of Workers' Compensation Immunity: A Call to the Legislature for a Statutorily Defined Intentional Tort Exception*, 28 Fla. St. U. L. Rev. 491, 497 (2001).
- 17 See *Lotysz v. Montgomery*, 766 N.Y.S.2d 28 (N.Y. 2003) (NFL player's medical malpractice claim against Club doctor barred by state workers' compensation statute); *Daniels v. Seattle Seahawks*, 968 P.2d 883 (Wash. Ct. App. 1998) (same); *Hendy v. Losse*, 819 P.2d 1 (Cal. 1991) (same). See also *Bryant v. Fox*, 515 N.E.2d 775 (Ill. App. Ct. 1987) (NFL player's medical malpractice claim against Club doctor not barred by workers' compensation statute where evidence established that doctor was an independent contractor). For more information on the possibility of players suing coaches, see Timothy Davis, *Tort Liability of Coaches for Injuries to Professional Athletes: Overcoming Policy and Doctrinal Barriers*, 76 UMKC L. Rev. 571 (2008).
- 18 CBA, Art. 43, § 2.
- 19 U.S.C. § 185.
- 20 *Allis-Chambers Corp. v. Lueck*, 471 U.S. 202, 213, 200 (1985).
- 21 See, e.g., *Givens v. Tennessee Football, Inc.*, 684 F. Supp. 2d 985 (M.D. Tenn. 2010) (player's tort claims against Club arising out of medical treatment preempted); *Williams v. Nat'l Football League*, 582 F.3d 863 (8th Cir. 2009) (players' tort claims arising out of drug test preempted).
- 22 *Smith v. Houston Oilers, Inc.*, 87 F.3d 717 (5th Cir. 1996).
- 23 *Id.*
- 24 *Id.*
- 25 Mark Cuban, owner of the NBA's Dallas Mavericks, has advocated such an approach: “You don’t go from the minors or college to the pros and all of a sudden become a spouse abuser, or any of a number of other serious personal issues. Those traits don’t suddenly appear when you make a pro roster. They were there in college. They were probably there prior to college. Yet we as leagues ignore those issues when we sign and draft players. That has to change. We need to participate in programs that publicly identify those athletes that have issues, and not allow them to play unless they go through rigorous counseling. We need to demand that colleges and minor leagues and high schools and summer travel programs identify and report issues. By not reporting abuse or other issues with their players, they could be costing them a shot at the pros. It’s our fault for not being more proactive. It’s college’s fault for not red-flagging these kids and getting them help.” Tim MacMahon, *Cuban: Be Proactive About Red Flags*, ESPN (Nov. 8, 2014, 1:46 PM), http://espn.go.com/dallas/nba/story/_/id/11836940/mark-cuban-need-more-proactive-athlete-red-flags, archived at <http://perma.cc/5U2J-7KNS>.



Chapter 11

Equipment Managers



Each NFL club employs three to four equipment managers. While equipment managers assist players in a variety of ways, their principal job is to help outfit players in equipment that will maximize their safety on the field, a crucial component of player health.

Before we begin our analysis, it is important to point out that throughout this chapter we emphasize that the practice of equipment managers is likely heterogeneous from club to club at least to some extent. Nevertheless, we were unable to interview equipment managers as part of this Report to gain a better understanding of their work. In November 2014, we notified the NFL that we intended to seek interviews with club personnel, including general managers, coaches, doctors, and athletic trainers. The NFL subsequently advised us that it was “unable to consent” to the interviews on the grounds that the “information sought could directly impact several

lawsuits currently pending against the league.” Without the consent of the NFL, we did not believe that the interviews would be successful and thus did not pursue the interviews at that time; instead, we have provided these stakeholders the opportunity to review draft chapters of the Report. We again requested to interview club personnel in July 2016 but the NFL did not respond to that request. The NFL was otherwise cooperative—it reviewed our Report and facilitated its review by club doctors and athletic trainers. The NFL also provided information relevant to this Report, including but not limited to copies of the NFL’s Medical Sponsorship Policy (discussed in Chapter 2: Club Doctors) and other information about the relationships between clubs and doctors.

Nevertheless, the NFL did not facilitate review of this chapter by any equipment managers. On the other hand, the American Equipment Managers Association (AEMA) did review the Report and provide comments.

(A) Background

Equipment managers are responsible for million dollar or more budgets and for ordering and constantly stocking hundreds of items players want and need in every conceivable variety, from their helmets and cleats to gum, washcloths, and toothpaste.¹ Equipment managers take pride in being responsive to the players’ every need to make sure they are maximally comfortable and prepared to play.² Perhaps most importantly, equipment managers help players select equipment and make sure the equipment fits according to the manufacturer’s guidelines.³

Equipment managers are also a critical link between equipment manufacturers (discussed in Chapter 16) and players. Equipment managers deal directly with equipment manufacturers and attend two NFL-organized seminars a year to keep up to date on the latest equipment so that they can provide the players the best available options.⁴

In summary, players rely on the equipment managers to help prepare and protect them. Not surprisingly, players and equipment managers sometimes develop close, personal relationships during their tenures with a club.⁵

The AEMA, a voluntary organization, provides certification to equipment managers working in sports across the country.⁶ The certification process requires: (1) a four-year college degree; (2) at least two years of experience working in athletics; and, (3) passing a written examination.⁷ The written examination covers management, administration, professional development, procurement, accountability, maintenance, and fitting and safety.⁸

The AEMA has a limited role in the NFL, in part because the AEMA’s limited resources prevent the AEMA from engaging with the NFL and other leagues as robustly as it would like.⁹ Approximately 60 to 70 percent of NFL equipment managers are AEMA-certified but neither the CBA nor the NFL independently requires any certification for equipment managers.¹⁰ Nevertheless, in recent years, the NFL has increasingly shown an interest in the AEMA’s work and the importance of qualified, well-trained equipment managers.¹¹

(B) Current Legal Obligations^a

The CBA contains no provisions specifically relevant to equipment managers or equipment. The NFL does have detailed policies on what equipment is mandatory for players, but these rules are directed at players, not equipment managers.

Employers have a common law non-delegable obligation to provide safe equipment to their employees.¹² A non-delegable duty is one whereby the employer cannot escape liability by having passed along the task to an employee; the employer will generally be held vicariously liable for the employee’s conduct concerning the provision of equipment regardless.¹³ In the context of NFL equipment managers, the law thus imposes the obligation to provide safe equipment to the players on the club, rather than the equipment managers.

Lastly, it is plausible that NFL players and equipment managers have a fiduciary relationship. Nevertheless, there are no known cases in which a player has alleged an equipment manager owed or breached a fiduciary duty and enforcing an alleged fiduciary relationship poses legal problems discussed below.^b

(C) Current Ethical Codes

The AEMA has a Code of Ethics for equipment managers.¹⁴ Of relevance, the fifth objective of the AEMA Code of Ethics is: “[t]o work as a group to bring about equipment improvements for greater safety of participants in all

a The legal obligations described herein are not an exhaustive list but are those we believe are most relevant to player health.

b Generally speaking, a fiduciary is “a person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence, and candor.” “Duty,” Black’s Law Dictionary (9th ed. 2009). Whether a fiduciary relationship exists is a fact-based inquiry into the nature of the relationship. *Ritani, LLC v. Aghjayan*, 880 F. Supp. 2d 425, 455 (S.D.N.Y. 2012) (applying New York law); *Carcano v. JBSS, LLC*, 684 S.E.2d 41, 53 (N.C. Ct. App. 2009); *L.C. v. R.P.*, 563 N.W.2d 799, 802 (N.D. 1997); *Allen Realty Corp. v. Holbert*, 318 S.E.2d 592, 595 (Va. 1984); *Murphy v. Country House, Inc.*, 240 N.W.2d 507, 511 (Minn. 1976). An argument could exist that the relationship of trust and confidence between a player and the equipment managers rises to that of a fiduciary relationship.

sports.” The AEMA Code of Ethics describes equipment manager’s obligations to players as follows:

Each and every member of an athletic squad should be treated conscientiously without discrimination or partiality. An athletic equipment manager can wield a great amount of influence on members of athletic squads by proper conduct and the use of good judgment in dealing with various personalities and temperaments.

In the care of equipment, the athletic equipment manager must be thorough in carrying out the accepted procedures and instructions. Any carelessness or laxity on the part of the athletic equipment manager in following through his responsibilities to players is a breach of ethical conduct (sic).¹⁵

(D) Current Practices

Equipment managers’ responsibilities have not changed much over time. As discussed above, they are focused on providing players not only their equipment, but also all the little things that make it easier for players to succeed. They are important but not particularly powerful employees in the NFL club hierarchy. Current players we interviewed had only good things to say about equipment managers:

- **Current Player 1:** *“I would say [they] are really good. Any time I need something, they’ve always taken care of it for me. And even for certain injury specific equipment, maybe it’s like an extra pad, shoulder pads or shin guards, something like that, or something you need done to your helmet, they’ve always been good about that – done whatever I’ve asked of them.”*
- **Current Player 2:** *“They do play a big role. Especially when it comes to helmets . . . , making sure that our helmets fit properly, that we’re in technology that’s up to date . . . I know that our guy here does a great job of that. He goes above and beyond to make sure everything that we wear . . . are up-to-date and fitting us properly.”*
- **Current Player 4:** *“I think they do a great job of getting players the equipment they want/or need.”*

Today, equipment managers seem to take serious their responsibility to help players understand the different helmet options and to choose one that fits best for that player. The New York Giants maintain two racks of possible helmet options for players to try on and consider.¹⁶ There, Joe Skiba, the Giants’ equipment director and a member of the NFL’s Subcommittee on Safety Equipment and Playing Rules, can explain to the players “the intricacies of helmet technology.”¹⁷

The equipment manager’s assistance in helping a player finding the right helmet is crucial. According to the American Academy of Neurology, “[t]here is moderate evidence indicating that use of a helmet (when well fitted, with approved design) effectively reduces, but does not eliminate, risk of concussion and more-serious head trauma in hockey and rugby; [and] similar effectiveness is inferred for football.”¹⁸

According to the American Academy of Neurology, “[t]here is moderate evidence indicating that use of a helmet (when well fitted, with approved design) effectively reduces, but does not eliminate, risk of concussion and more-serious head trauma in hockey and rugby; [and] similar effectiveness is inferred for football.”

To assist equipment managers help players with their helmet decisions, in 2015, the Engineering Subcommittee of the NFL’s Head, Neck and Spine Committee completed a study evaluating the ability of 17 different helmets to absorb impacts, including accounting for rotational velocity and rotational acceleration.¹⁹ Based on the test results, the NFL created a poster listing the helmets in order of performance for equipment managers to display for the players’ review.²⁰ The study was repeated in 2016, and again presented to the players in both a memorandum and as a poster.²¹ Similarly, according to the NFL, the NFL and NFLPA have also commissioned studies concerning cleats and shoes, and have created posters warning players about certain shoes and cleats that are not recommended for use.²² More information on player equipment can be found in Chapter 16: Equipment Manufacturers.

The difficulty equipment managers sometimes face is player cooperation. Linebacker Keith Rivers admitted that appearance generally mattered more than safety: “a lot of guys go looks first.”²³ Additionally, many players are reluctant to change helmets from the ones they have been playing with for their entire NFL career, if not since college.²⁴ This

practice may stand in the way of adopting safer helmets or other equipment by players. Nevertheless, while some players might choose their helmet based on looks, what is important is that they are choosing among helmets that have met threshold requirements for safety. What is essential is that equipment managers help players find the best helmet for them.

(E) Enforcement of Legal and Ethical Obligations^c

Any claim brought by a player against an equipment manager would likely be barred by workers' compensation laws. Workers' compensation statutes provide compensation for workers injured at work and thus generally preclude lawsuits against co-workers (such as NFL players and equipment managers) based on the co-workers' negligence.²⁵

The CBA also presents a potential obstacle for claims against an equipment manager. This is because the Labor Management Relations Act (LMRA)²⁶ bars or "preempts" state common law^d claims, such as negligence, 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" CBA."²⁷ In these cases, player complaints must be resolved through the enforcement provisions provided by the CBA itself (*i.e.*, a Non-Injury Grievance against the Club), rather than litigation. In the case of equipment managers, the CBA is generally silent as to the provision of equipment and thus it is not certain that claims concerning equipment against either the club or equipment manager would be preempted by the LMRA. Nevertheless, as discussed in several chapters of this Report, the NFL has successfully asserted the preemption defense in many lawsuits concerning the health of NFL players.

Instead of attempting a lawsuit, players who believe they have been harmed by the actions of their equipment managers could likely commence a Non-Injury Grievance.^e The 2011 CBA directs certain disputes to designated arbitration mechanisms^f and directs the remainder of any disputes involving the CBA, a player contract, NFL rules, or generally the terms and conditions of employment to the Non-Injury Grievance arbitration process.²⁸

However, there are several impediments to pursuing a Non-Injury Grievance against an equipment manager. First and foremost, club employees are not parties to the CBA and thus likely cannot be sued for violations of the CBA.²⁹ Instead, the player could seek to hold the club responsible for the equipment manager's violation of the CBA.³⁰ Second, as discussed above, the player's claim might be barred by workers' compensation statutes. Third, Non-Injury Grievances must be filed within 50 days "from the date of the occurrence or non-occurrence upon which the grievance is based,"³¹ a timeframe that is much shorter than your typical statute of limitations. And fourth, players likely fear that pursuing a grievance against an equipment manager could result in the club terminating him.^g

The AEMA is empowered to investigate possible breaches of its Code of Ethics but its remedial authority is limited to a "letter or censorship, letter of censorship with a period of probation, or cancellation of membership."

c Appendix K is a summary of players' options to enforce legal and ethical obligations against the stakeholders discussed in this Report. In addition, for rights articulated under either the CBA or other NFL policy, the NFLPA and the NFL can also seek to enforce them on players' behalves.

d Common law refers to "[t]he body of law derived from judicial decisions, rather than from statutes or constitutions." Black's Law Dictionary (9th ed. 2009). The concept of "preemption" is "[t]he principle (derived from the Supremacy Clause [of the Constitution]) that a federal law can supersede or supplant any inconsistent state law or regulation." *Id.*

e The term "Non-Injury Grievance" is something of a misnomer. The CBA differentiates between an "Injury Grievance" and a "Non-Injury Grievance." An Injury Grievance is exclusively "a claim or complaint that, at the time a player's NFL Player Contract or Practice Squad Player Contract was terminated by a Club, the player was physically unable to perform the services required of him by that contract because of an injury incurred in the performance of his services under that contract." 2011 CBA, Art. 44, § 1. Generally, all other disputes (except System Arbitrations, *see* 2011 CBA, Art. 15) concerning the CBA or a player's terms and conditions of employment are Non-Injury Grievances. 2011 CBA, Art. 43, § 1. Thus, there can be disputes concerning a player's injury or medical care which are considered Non-Injury Grievances because they do not fit within the limited confines of an Injury Grievance.

f For example, Injury Grievances—which occur when at the time a player's contract was terminated the player claims he was physically unable to perform the services required of him because of a football-related injury—are heard by a specified Arbitration Panel. 2011 CBA, Art. 44. Additionally, issues concerning certain Sections of the CBA related to labor and antitrust issues, such as free agency and the Salary Cap, are within the exclusive scope of the System Arbitrator, 2011 CBA, Art. 15, currently University of Pennsylvania Law School Professor Stephen B. Burbank.

g Current Player 8: "You don't have the gall to stand against your franchise and say 'They mistreated me.' . . . I, still today, going into my eighth year, am afraid to file a grievance, or do anything like that[.]" While it is illegal for an employer to retaliate against an employee for filing a grievance pursuant to a CBA, *N.L.R.B. v. City Disposal Systems Inc.*, 465 U.S. 822, 835–36 (1984), such litigation would involve substantial time and money for an uncertain outcome.



(F) Recommendations Concerning Equipment Managers

As a preliminary matter, we recommend equipment managers continue to act as they have. Reports indicate that equipment managers work diligently and take seriously their role in providing players with equipment that will minimize the health and safety risks of playing football. Equipment managers do not appear to have any incentive to make decisions which might jeopardize player health, *e.g.*, such as pressuring a player to play with an injury, like other club employees, such as coaches or medical staff. Additionally, the twice-annual meetings for equipment managers and manufacturers seem like an appropriate way for the equipment managers to remain current and educated on the latest equipment. Minimal other recommendations are needed concerning equipment managers.

Goal 1: To ensure that players are served by the best possible equipment managers.

Principles Advanced: Respect; Health Primacy; and, Collaboration and Engagement.

Recommendation 11:1-A: The CBA should require that all equipment managers be certified by the AEMA.

As discussed above, the AEMA's certification program sets reasonable minimum education and experience requirements and requires equipment managers to pass a test certifying their competence in a variety of issues pertinent to the equipment industry, including fitting and safety. In addition, the AEMA requires its members to attend continuing education courses. Requiring NFL equipment managers to be AEMA-certified is a meaningful way of ensuring that the equipment managers working with NFL players are among the most qualified and educated in the industry. The requirement is meaningful enough that it should be codified in the CBA. Ensuring highly-qualified equipment managers will help ensure that players are using the best, well-fitting, and safest equipment possible.

Endnotes

- 1 See Bill Pennington, *A Full-Gear Operation*, N.Y. Times, Aug. 17, 2013, <http://www.nytimes.com/2013/08/17/sports/football/for-the-giants-a-full-gear-operation.html> archived at <http://perma.cc/2SQB-LUSR>; Kevin Baxter, *NFL: Gearing Up for the Game, a Whole Laundry List*, L.A. Times, Nov. 6, 2012, available at 2012 WLNR 23540542; Craig K. Paskoski, *Lit-tlestown Resident Helps the Ravens Look Good, Play Well*, Evening Sun (Hanover, PA), Oct. 16, 2011, available at 2011 WLNR 21180003; Danny Woodward, *All the Right Equipment: Cowboys Staff Makes Sure Team Has Everything It Needs*, Dall. Morning News, Nov. 21, 2001, available at 2001 WLNR 11689243; Rob Huizenga, M.D., *You're Okay, It's Just a Bruise* 13 (1994) (discussing Los Angeles Raiders players "stealing various toiletries").
- 2 See *id.*
- 3 Interview with Kelly Jones, Certification Steering Committee Chair, AEMA, and Equipment Manager, Gettysburg College, and Mike Royster, Executive Director, AEMA, and Equipment Manager, University of Tennessee Chattanooga (Oct. 27, 2014).
- 4 See Sam Borden, *Despite Risks, N.F.L. Leaves Helmet Choices in Players' Hands*, N.Y. Times, Sept. 20, 2012, <http://www.nytimes.com/2012/09/21/sports/football/despite-risks-nfl-leaves-helmet-choices-in-players-hands.html>, archived at <https://perma.cc/K4YB-PBT7?type=pdf>. Research did not reveal the details about the nature of these seminars, *e.g.*, whether they are more like trade shows than informational seminars.
- 5 See, *e.g.*, Paskoski *supra* note 1 (discussing Baltimore Ravens Pro Bowl defensive end Terrell Suggs referring to Ravens' equipment manager Ed Carroll as "dad").
- 6 For more information on the AEMA, see its website at <http://equipmentmanagers.org>.
- 7 Interview with Jones and Royster, *supra* note 3.
- 8 *Certification*, Athletic Equipment Managers Ass'n, <http://equipmentmanagers.org/certification> (last visited Aug. 7, 2015), archived at <http://perma.cc/2SSQ-9JGS>.
- 9 Interview with Jones and Royster, *supra* note 3.
- 10 *Id.* By comparison, approximately 90 percent of NCAA Division I equipment managers are AEMA members.
- 11 *Id.*
- 12 *Suburban Hospital, Inc. v. Kirson*, 763 A.2d 185, 205 (Md. 2000); *Gerrish v. Savard*, 739 A.2d 1195, 1199 (Vt. 1999); *Johansen v. Anderson*, 555 N.W.2d 588, 593 (N.D. 1996); *Smith v. Massey-Ferguson, Inc.*, 883 P.2d 1120, 1131 (Kan. 1994); *Kenemer v. McFann*, 470 So.2d 1113, 1116 (Ala. 1985); *Gerger v. Campbell*, 297 N.W.2d 183, 186 (Wis. 1980).
- 13 See *id.*
- 14 The AMEA Code of Ethics is on file with the authors.
- 15 *Id.*
- 16 Borden, *supra* note 4.
- 17 *Id.*
- 18 *Update: Evaluation and Management of Concussion in Sports—2013*, Am. Acad. Neurology, https://www.aan.com/uploadedFiles/Website_Library_Assets/Documents/3Practice_Management/5Patient_Resources/1For_Your_Patient/6_Sports_Concussion_Toolkit/evaluation.pdf (last visited Aug. 7, 2015), archived at <https://perma.cc/7943-3EXG?type=pdf>.
- 19 Nat'l Football League, 2015 Player Health & Safety Report 12 (2015), <http://static.nfl.com/static/content/public/photo/2015/08/05/0ap3000000506671.pdf>, archived at <https://perma.cc/Y4BN-TUP7?type=pdf>.
- 20 *Id.*
- 21 NFL Comments and Corrections (June 24, 2016).
- 22 *Id.*
- 23 Borden, *supra* note 4.
- 24 *Id.* (Giants center David Baas, who is in his eighth NFL season, said veterans can be hesitant to change anything related to their equipment. "Some guys don't want to switch because they're comfortable in the same one they've had since college or whatever," he said.)
- 25 See Alexander Cornwell, *Trapped; Missouri Legislature Seeks to Close Workers' Compensation Loophole with Some Co-Employees Still Inside*, 77 Mo. L. Rev. 235, 235 (2012); David J. Krco, *Case Note: Torts – Narrowing the Window: Refining the Personal Duty Requirement for Coemployee Liability Under Minnesota's Workers' Compensation System – Stringer v. Minnesota Vikings Football Club, LLC*, 33 Wm. Mitchell L. Rev. 739, 739 (2007); John T. Burnett, *The Enigma of Workers' Compensation Immunity: A Call to the Legislature for a Statutorily Defined Intentional Tort Exception*, 28 Fla. St. U. L. Rev. 491, 497 (2001).
- 26 U.S.C. § 185.
- 27 *Allis-Chambers Corp. v. Lueck*, 471 U.S. 202, 213, 200 (1985).
- 28 See 2011 CBA, Art. 43, § 1.
- 29 See *Jackson v. Kimel*, 992 F.2d 1318, 1325 n.4 (4th Cir. 1993) (collecting cases holding that employees that are not signatories to the CBA cannot be sued for violations of the CBA).
- 30 See 2011 CBA, Art. 2, § 2 (generally discussing CBA's binding effect on NFL, NFLPA, players and clubs but no other party).
- 31 CBA, Art. 43, § 2.