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Improving the Game: The Football Players Health Study at Harvard University and the 2020 NFL-NFLPA Collective Bargaining Agreement

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Abstract

This Article examines the connections between player health and safety provisions in the 2020 NFL-NFLPA collective bargaining agreement ("CBA") and research conducted, and recommendations made, by the Football Players Health Study at Harvard ("FPHS"). More specifically, between 2016 and 2019, the Law and Ethics Initiative of FPHS produced eight publications "with the primary goal of understanding the legal and ethical issues that may promote or impede player health and developing appropriate responsive recommendations." The Law and Ethics Initiative's work, among other things, analyzed the legal and ethical obligations of stakeholders in NFL player health; scrutinized the structure of club medical staffs; compared the NFL's health-related policies and practices to those of other sports leagues; evaluated the application of the Americans with Disabilities Act, Genetic Information Nondiscrimination Act, and Occupational Safety and

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Health Act to the NFL workplace; and assessed challenges players face concerning mental health and transitioning out of the NFL.

The 2020 CBA responded to the Law and Ethics Initiative's work in many ways, including occasionally adopting wholesale some of its recommendations. This result is not surprising given that the Law and Ethics Initiative regularly engaged with the NFL, NFLPA, and other stakeholders during its work. The parties also made other changes to health and safety provisions not discussed in FPHS work. Nevertheless, the NFL and NFLPA have still failed to meaningfully address one of the principal legal and ethical issues concerning player health: the conflicted structure in which club medical staff provide services to both players and the clubs. Indeed, the NFL and NFLPA have yet to articulate a coherent response to the Law and Ethics Initiative's extensive analysis of, and recommendation toward, this issue. Consequently, while the 2020 CBA represents important progress on player health and safety issues, there is still work to be done.

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Introduction

2011 was a critical year for the National Football League ("NFL" or "League"). In the preceding years, the League had faced considerable and growing scrutiny for its alleged mishandling of player health matters, concussions in particular.[3] In July of 2011, 73 former NFL players sued the League and its member clubs alleging that they had failed to properly protect the players from the risks associated with head injuries.[4] Similar lawsuits soon followed.[5]

Also in 2011, the NFL was engaged in litigation with the National Football League Players Association ("NFLPA") concerning the recently expired collective bargaining agreement ("CBA"),[6] as a new season approached. In late July, the NFL and NFLPA settled their differences and agreed to a new CBA (the "2011 CBA").[7] The 2011 CBA significantly changed various components of the parties' relationship and League operations, including the parties' respective shares of revenue, salary cap calculations, and rookie compensation.[8] Yet, some of the biggest changes concerned player health and benefits for former players.[9]

Of particular relevance to this Article, the 2011 CBA set aside $11 million per year through 2021 to be dedicated to research on NFL player health.[10] After a request for proposal process, the NFLPA and Harvard University entered into an agreement in 2014 to create the Football Players Health Study at Harvard University ("FPHS"), a long-term research initiative with the goal of improving the health of professional football players

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[3] *See* Christopher R. Deubert et al., *Protecting and Promoting the Health of NFL Players: Legal and Ethical Analysis and Recommendations* (Nov. 2016) at 208-11, available at https://footballplayershealth.harvard.edu/law-and-ethics-protecting-and-promoting/ [https://perma.cc/YF2B-D3BU] and at 7 Harv. J. Sports & Ent. L. 1 (2016) [hereinafter *Protecting and Promoting*].

[4] *See In re Nat'l Football League Players' Concussion Injury Litigation*, 307 F.R.D. 351, 361 (E.D. Pa. 2014).

[5] *See id.*

[6] *See Brady v. Nat'l Football League*, 640 F.3d 785 (8th Cir. 2011); Chris Deubert et al., *All Four Quarters: A Retrospective and Analysis of the 2011 Collective Bargaining Process and Agreement in the National Football League*, 19 UCLA Ent. L. Rev. 1 (2012) [hereinafter *All Four Quarters*].

[7] Collective Bargaining Agreement, NFL/NFLPA (Aug. 4, 2011) [hereinafter 2011 CBA]; *All Four Quarters*, *supra* note 6, at 39.

[8] *See All Four Quarters*, *supra* note 6, at 44-61.

[9] *See Protecting and Promoting*, *supra* note 3, at 211-12; *All Four Quarters*, *supra* note 6, at 70.

[10] *See* 2011 CBA, *supra* note 7, at Art. 12, § 5.

across a broad spectrum.[11] FPHS, as initially structured, understandably included a variety of medical studies.[12] However, what differentiated FPHS from the numerous other studies conducted around that time concerning NFL player health was the inclusion of a law and ethics component (the "Law and Ethics Initiative").[13]

The Law and Ethics Initiative encompassed "a variety of distinct projects with the primary goal of understanding the legal and ethical issues that may promote or impede player health and developing appropriate responsive recommendations."[14] One of the authors here (Deubert) was a key contributor to the Law and Ethics Initiative from May 2014 to May 2017, as will be discussed further below.

Fast forward to 2020. The 2011 CBA was set to expire in March 2021.[15] After a relatively subdued series of negotiations (*i.e.*, without litigation or a threat thereof), the parties agreed to a new CBA in March 2020 extending the agreement through March 2031 (the "2020 CBA").[16] The 2020 CBA, like the 2011 CBA, made numerous changes to player health and safety provisions. Those changes are the focus of this work. More specifically, this Article reviews how those changes respond or relate to recommendations and analysis put forth by FPHS, and the Law and Ethics Initiative in particular.

This Article proceeds in five Parts, with summaries of the following issues: (I) FPHS and the Law and Ethics Initiative; (II) relevant developments in NFL player health between the 2011 CBA and the 2020 CBA; (III) the player health and safety changes in the 2020 CBA that are connected to work produced by FPHS; and (IV) other player health and safety changes in the 2020 CBA. The Article concludes by summarizing the progress of the 2020 CBA and the work still to be done.

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[11] *See Protecting and Promoting*, *supra* note 3, at 24-25.

[12] *See id.*

[13] *See id.* at 25.

[14] *Id.*

[15] *See* 2011 CBA, *supra* note 7, at Art. 69, § 1.

[16] *See* Grant Gordon, *NFL Player Vote Ratifies New CBA Through 2030 Season*, NFL (Mar. 15, 2020), https://www.nfl.com/news/nfl-player-vote-ratifies-new-cba-through-2030-season-0ap3000001106246 [https://perma.cc/GT6B-9P6L]; Collective Bargaining Agreement, NFL/NFLPA (Mar. 5, 2020) [hereinafter 2020 CBA], Art. 66, § 1.

I. The Football Players Health Study at Harvard University

FPHS initially included three components: "(1) [a] Population Studies component, which entail[ed] research using questionnaires and testing to better understand player health status, wellness, and quality of life, including the largest-ever cohort study of living former NFL players; (2) [a] Pilot Studies program aimed to develop new prevention strategies, diagnostics, and treatments by funding researchers working on innovative and promising developments that have the potential to impact the health of football players;" and (3) the Law and Ethics Initiative.[17]

Before providing additional information on these studies, it is important to clarify the relationship between Harvard University and the NFLPA during the course of FPHS. As alluded to above, Harvard University and the NFLPA agreed to an initial statement of work for three different types of research projects.[18] Otherwise, the FPHS researchers conducted their work independent of any control by the NFLPA, NFL, or any other party.[19] Indeed, this independence was contractually protected in the FPHS funding agreement.[20] Consequently, there should be no doubt that the work conducted by FPHS is of the high caliber expected of Harvard University.

The Population Studies and Pilot Studies have evolved over time. Today, FPHS describes itself as "[h]arnessing the expertise of the University's faculty and researchers across interdisciplinary domains, including neurology, sports medicine, rehabilitation medicine, public health, cardiology, and more . . . to advance our knowledge of the interdependency of the multiple, and often interrelated, conditions that players face."[21] FPHS' goals today are to: "[b]etter understand the benefits and risks of playing professional football"; "[i]dentify risks that may be reversible or preventable"; and "[d]evelop interventions to improve health and wellbeing."[22]

As of May 2020, FPHS has produced approximately 40 peer-reviewed publications in medical journals, concerning a wide range of health issues relevant to football players.[23] There are two projects worth highlighting.

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[17] *See Protecting and Promoting*, *supra* note 3, at 25.

[18] *See id.* at 10.

[19] *See id.*

[20] *See id.*

[21] *See Who We Are*, Football Players Health Study at Harv. U., https://footballplayershealth.harvard.edu/about/ [https://perma.cc/7XV7-C8HX] (last visited Nov. 4, 2020).

[22] *Id.*

[23] *See Publications*, Football Players Health Study at Harv. U., https://footballplayershealth.harvard.edu/publications/ [https://perma.cc/RRK9-M538] (last visited Nov. 4, 2020).

First, one of the core components of FPHS was to conduct the largest ever medical survey of former NFL players.[24] Using data obtained from the NFLPA and public resources, it was estimated that there were approximately 20,000 former NFL players, 16,000 of whom were alive as of 2014.[25] Following an extensive, complicated, and repetitive process of reaching out to and engaging with former players, FPHS ultimately collected medical information from 3,785 former NFL players, achieving its goal of being the largest ever study of former players.[26] The results of the questionnaires completed by the players have provided valuable data used to conduct numerous studies on specific issues.[27]

Among the most interesting results from related studies are: 40% of respondents reported "daily problems due to cognitive dysfunction";[28] "seasons of play and playing position in the NFL are associated with lasting neuropsychiatric health deficits";[29] "poor cognition-related QOL [quality of life], depression, and anxiety appear to be associated with concussion in the long term";[30] 27% of former players "reported two or more medical afflictions (chronic pain, cardiometabolic disease, sleep apnea, or neurocognitive impairment)";[31] and, when compared to Major League Baseball players, "NFL players had significantly elevated rates of all-cause . . . , cardiovascular disease . . . , and neurodegenerative disease . . . mortality."[32] Importantly, each of these studies has its own limitations, which should be carefully considered alongside any extensive reference. Nevertheless, the Population Studies component of FPHS has clearly helped to provide a valuable understanding of the health risks of an NFL career.

Second, one pilot study deserves special attention as a study representative of the program's goals. Dr. Martha M. Murray, an orthopedic surgeon with Harvard Medical School and an advisor to FPHS, has done ground-

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[24] *See generally* Ross Zafonte et al., *The Football Players' Health Study at Harvard University: Design and objectives*, 62 Am. J. Indus. Med. 643 (2019).

[25] *See id.* at 646.

[26] *See id.* at 643, 651.

[27] *See id.* at 646-53.

[28] *See* Franziska Plessow et al., *Self-Reported Cognitive Function and Mental Health Diagnoses Among Former Professional American-Style Football Players*, 37 J. Neurotrauma 1021 (2020).

[29] Andrea L. Roberts et al., *Exposure to American Football and Neuropsychiatric Health in Former National Football League Players*, 47 Am. J. Sports Sci. 2871 (2019).

[30] *Id.*

[31] Timothy P. Morris et al., *Multisystem Afflictions in Former National Football League Players*, 62 Am. J. Indus. Med. 655 (2019).

[32] Vy T. Nguyen et al., *Mortality Among Professional American-Style Football Players and Professional American Baseball Players*, 2 JAMA Network Open (2019).

breaking work on repairs of injuries to anterior cruciate ligaments ("ACLs"), which are critical components of a healthy knee. Torn ACLs are significant injuries that frequently end or significantly impact NFL players' careers.[33] Today, torn ACLs are typically repaired through a tendon graft, usually with a tendon from the hamstring or patella.[34] However, this procedure does not fully restore motion in the knee joint and leads to osteoarthritis in approximately 76% of patients.[35] Dr. Murray, with support from FPHS and other sources, has developed a new method for repairing torn ACLs.[36] Dr. Murray's method involves the implantation of a protein in the gap between the torn ends of the ACL, a procedure known as bridge-enhanced ACL repair, or BEAR.[37] This process effectively enables the ACL to heal itself in a much less invasive process.[38] Importantly, early clinical trials in humans have shown improved and shorter recoveries.[39] Dr. Murray's research thus presents a promising future for reducing problems associated with one of the worst injuries suffered by NFL players.

To finish our discussion of FPHS, we turn to the Law and Ethics Initiative, which will form the focus of this Article. The Law and Ethics Initiative was led by I. Glenn Cohen, a professor from Harvard Law School and the Faculty Director of the Petrie-Flom Center for Health Law Policy, Biotech-

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[33] *See* Matthew T. Provencher et al., *A History of Anterior Cruciate Ligament Reconstruction at the National Football League Combine Results in Inferior Early National Football League Career Participation*, 34 ARTHROSCOPY 2446 (2018); Connor R. Read et al., *Return to Play and Decreased Performance After Anterior Cruciate Ligament Reconstruction in National Football League Defensive Players*, 45 AM. J. SPORTS MED. 1815 (2017); Dave Siebert, *A Closer Look at the ACL as Tears Continue to Run Rampant in the NFL*, BLEACHER REPORT (Aug. 7, 2013), https://bleacherreport.com/articles/1729646-a-closer-look-at-the-acl-as-tears-continue-to-run-rampant-in-the-nfl [https://perma.cc/X7TB-AZ6P].

[34] *See generally* Martha A. Murray et al., *Bridge-Enhanced Anterior Cruciate Ligament Repair Is Not Inferior to Autograft Anterior Cruciate Ligament Reconstruction at 2 Years*, 48 AM. J. SPORTS MED. 1305 (2020).

[35] *See Martha Murray*, BOSTON CHILDREN'S HOSPITAL, https://www.childrenshospital.org/directory/physicians/m/martha-murray [https://perma.cc/DB6Q-NG8W] (last visited Nov. 4, 2020).

[36] *See id.*; Murray et al., *supra* note 34; *Moving Forward: Minimally-Invasive ACL Repair*, THE FOOTBALL PLAYERS HEALTH STUDY AT HARV. U. (Mar. 2, 2018), https://footballplayershealth.harvard.edu/about/news/developing-a-better-surgery-for-acl-repair/ [https://perma.cc/3WG9-UCTT].

[37] *See Moving Forward: Minimally-Invasive ACL Repair*, FOOTBALL PLAYERS HEALTH STUDY AT HARV. U. (Mar. 2, 2018), https://footballplayershealth.harvard.edu/about/news/developing-a-better-surgery-for-acl-repair/ [https://perma.cc/3WG9-UCTT].

[38] *See id.*

[39] *See id.*

nology, and Bioethics, and Holly Fernandez Lynch, the then-Executive Director of the Petrie-Flom Center.[40] Cohen and Lynch are both attorneys with expertise in health law and bioethics.[41] To complement Cohen and Lynch's expertise and part-time obligations to FPHS, they hired Christopher Deubert (one of the authors of this Article), to lead the full-time research efforts. Deubert had been a litigator in New York with extensive experience working on NFL-player matters.[42]

While the FPHS medical studies discussed above are ongoing, the Law and Ethics Initiative operated for approximately three years, from May 2014 through May 2017, as set forth in the initial Harvard-NFLPA agreement. The Initiative ultimately produced numerous publications analyzing legal and ethical issues affecting NFL player health:

1. Christopher R. Deubert et al., *Protecting and Promoting the Health of NFL Players: Legal and Ethical Analysis and Recommendations* (2016), available at 7 Harv. J. Sports & Ent. L. 1 (2016).
2. I. Glenn Cohen et al., *NFL Player Health: The Role of Club Doctors*, 46 Hastings Ctr. Rep. 2 (2016).
3. Jessica L. Roberts et al., *Evaluating NFL Player Health and Performance: Legal and Ethical Issues*, 165 U. Pa. L. Rev. 227 (2017).
4. Jessica L. Roberts et al., *Commentary: The Legality of Biometric Screening of Professional Athletes*, 17 Am. J. Bioethics 65 (2017).
5. Christopher R. Deubert et al., *Comparing Health-Related Policies & Practices in Sports: The NFL and Other Professional Leagues* (2017), available at 8 Harv. J. Sports & Ent. L. 2 (May 2017, Special Issue).
6. Adam M. Finkel et al., *The NFL as a Workplace: The Prospect of Applying Occupational Health and Safety Laws to Protect NFL Workers*, 60 Ariz. L. Rev. 291 (2018).
7. Sarah McGraw et al., *Life on an Emotional Rollercoaster: NFL Players and Their Family Members' Perspectives on Player Mental Health*, 12 J. Clinical Sport Psych. 404 (2018).
8. Sarah McGraw et al., *NFL or 'Not for Long'? Transitioning out of the NFL*, 42 J. Sport Behavior 461 (2019).

In addition to the above publications, Deubert independently published an article influenced by his time with FPHS: Christopher R. Deubert, *The Combine and the Common Rule: Future NFL Players as Unknowing Research Participants*, 123 Penn St. L. Rev. 303 (2019).

[40] *See Protecting and Promoting*, *supra* note 3, at 8.
[41] *See id.*
[42] *See id.* at 6.

It is important to note that this Article is not affiliated with FPHS in any way. Further, before evaluating the connections between the 2020 CBA and FPHS, it is important to also understand how the universe of issues affecting NFL player health changed between the 2011 CBA and the 2020 CBA.

II. NFL Player Health and Safety From a Legal Perspective (2011-20)

The Introduction to this Article referenced lawsuits initiated by former NFL players against the League during the critical year of 2011. Although the lawsuits were initiated by former NFL players, these lawsuits had a major influence on NFL health and safety policy for current players as well.

A history of these lawsuits is instructive. Beginning with the first lawsuit in July 2011, former NFL players filed a wave of lawsuits against the NFL and its clubs, all generally alleging that the NFL had been negligent (or worse) in its handling of, and education surrounding, concussions.[43] The lawsuits focused on the work of the NFL's Mild Traumatic Brain Injury ("MTBI") Committee, which between 2003 and 2009 published 16 academic articles concerning concussions in the NFL.[44] The last 14 papers from the MTBI Committee were strongly and repeatedly criticized by the scientific community for downplaying the risks of concussions and the relationship between playing in the NFL and brain injuries.[45] At the same time the MTBI Committee was producing its research, medical experts made important progress on the types of brain injuries and conditions suffered by former NFL players, including the newly named chronic traumatic encephalopathy ("CTE").[46]

In January 2012, the lawsuits were consolidated into a single class action (the "Concussion Litigation").[47] Eventually, more than 5,500 former NFL players joined the lawsuit.[48] The Concussion Litigation presented considerable risks for both sides: even before reaching trial, the NFL was faced with voluminous and potentially embarrassing discovery concerning the MTBI Committee and the efforts and knowledge of individual club owners

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[43] *See id.* at 217.

[44] *See In re Nat'l Football League Players' Concussion Injury Litigation*, 307 F.R.D. 351, 362 (E.D. Pa. 2014); *Protecting and Promoting*, *supra* note 3, at 208-209.

[45] *Protecting and Promoting*, *supra* note 3, at 176.

[46] *See id.*

[47] *See id.* at 184.

[48] *See id.*

and League officials concerning concussions;[49] on the other hand, the players faced the very real possibility of having their claims dismissed as preempted (*i.e.*, barred) by the CBAs executed over the years between the NFL and NFLPA.[50] Relatedly, if the cases had proceeded to trial, the former players would have faced scientific and legal hurdles in proving that their injuries and conditions were caused by the NFL's actions,[51] while the NFL would have been liable for "substantial damages awards" if the players were successful in their claims.[52]

In light of these competing risks, the parties settled in January 2014.[53] The settlement provided all former NFL players the opportunity to undergo baseline neurological and neuropsychological examination and the opportunity for multi-million dollar monetary awards (subject to various adjustments) for amyotrophic lateral sclerosis ("ALS"), death with CTE prior the date of the settlement, Parkinson's disease, Alzheimer's disease, or dementia.[54] Importantly, the players are not required to prove that their conditions are related to having played in the NFL and the NFL did not admit any wrongdoing or liability.[55] Although the settlement has no monetary cap, it is estimated that it will cost the NFL approximately $1 billion.[56]

In April 2015, the settlement was approved by the United States District Court for the Eastern District of Pennsylvania,[57] a decision affirmed by the United States Court of Appeals for the Third Circuit a year later.[58] Since that time, the settlement fund has paid out 1,200 awards at a total cost of $811,444,879.30, or $676,204.07 per award.[59] Additionally, players have had more than 12,000 free visits with doctors at which the players were

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[49] *See In re Nat'l Football League Players' Concussion Injury Litigation*, 821 F.3d 410, 438 (3d Cir. 2016); *In re Nat'l Football League Players' Concussion Injury Litigation*, 307 F.R.D. 351, 388, 391 (E.D. Pa. 2014).

[50] *See* 307 F.R.D. at 362, 390-91.

[51] *See* 821 F.3d at 439-40; 307 F.R.D. at 391-94.

[52] *See* 821 F.3d at 440.

[53] *See* 307 F.R.D. at 422.

[54] *See Protecting and Promoting*, *supra* note 3, at 185.

[55] *See id.*

[56] *See In re Nat'l Football League Players' Concussion Injury Litigation*, 821 F.3d 410, 447 (3d Cir. 2016).

[57] *See In re Nat'l Football League Players' Concussion Injury Litigation*, 307 F.R.D. 351 (E.D. Pa. 2014).

[58] *See* 821 F.3d 410 (3d Cir. 2016).

[59] *See* NFL Concussion Settlement, https://www.nflconcussionsettlement.com/ [https://perma.cc/2VYY-VU3C] (last visited Jan. 8, 2021).

evaluated for neurological and neuropsychological conditions potentially compensable under the settlement.[60]

Notably, the NFLPA was not immune to litigation from former players concerning head injuries. In 2014, several former players sued the NFLPA alleging that it had intentionally and fraudulently failed to protect them from the risk of concussions during their careers.[61] The lawsuit was brought by some of the same attorneys involved in the Concussion Litigation against the NFL and substantially duplicated the allegations in that lawsuit.[62] The case forced the NFLPA for the first time to express publicly an opinion about concussion-related claims by former players.[63] Interestingly, the NFLPA asserted the same defense as the NFL – that the players' claims were preempted by the CBAs.[64] The court agreed and dismissed the former players' claims, but not without having drawn public scrutiny to the NFLPA's role in past mishandling of concussions.[65]

In addition to the Concussion Litigation, there were other lawsuits concerning NFL player health. Former player Carl Eller filed separate lawsuits against both the NFL and NFLPA concerning the pension, retirement, and disability benefits provided to former players in the 2011 CBA.[66] Ultimately, the lawsuit against the NFL was settled on undisclosed terms, while the one against the NFLPA was dismissed.[67] Thus, while Eller failed to score any significant legal or financial wins, his lawsuits made clear that former players would continue to pursue creative avenues to influence the NFL and NFLPA to improve the benefits available to former players.

The decade between the 2011 CBA and the 2020 CBA also included considerable discussion and litigation concerning players' use, and NFL clubs' provision of, medications or "painkillers."[68] Various surveys found potentially troubling usage rates of opioids and prescription painkillers (such as Toradol) by former players during their playing days.[69] Not surprisingly then, in 2014, several former NFL players sued the NFL alleging that NFL clubs and their doctors had negligently and fraudulently prescribed

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[60] *See id.*

[61] *See Protecting and Promoting*, *supra* note 3, at 196.

[62] *See id.*

[63] *See id.*

[64] *See id.*

[65] *See id.* at 228-29.

[66] *See Eller v. Nat'l Football League Players Ass'n*, 872 F. Supp. 2d 823 (D. Minn. 2012), *aff'd* 731 F.3d 752 (8th Cir. 2013); *Protecting and Promoting*, *supra* note 3, at 212.

[67] *See* 872 F. Supp. 2d 823 (D. Minn. 2012), *aff'd* 731 F.3d 752 (8th Cir. 2013).

[68] *See Protecting and Promoting*, *supra* note 3, at 142-48.

[69] *See id.* at 143-44.

and administered painkilling medications during the players' careers.[70] The lawsuit was initially dismissed by the United States District Court for the Northern District of California,[71] before being reinstated by the Ninth Circuit,[72] and then dismissed again by the District Court on remand.[73] In the District Court's most recent decision, it found that claims against the NFL could not be sustained since the NFL was not directly involved in the handling, distribution, and administration of medications.[74] However, the Ninth Circuit recently ruled that the players plausibly alleged a claim for negligence arising out of the NFL's purported voluntary undertaking.[75] In parallel, a similar lawsuit was brought against the NFL clubs, which was largely – but not entirely – dismissed.[76] The clubs later prevailed on summary judgment.[77]

The multitude of litigation unsurprisingly contributed to considerable public interest in and scrutiny of the NFL's handling of player health matters.[78] Indeed, in 2016, the NFL participated in a roundtable discussion before a congressional committee concerning concussion research and treatment.[79] During that discussion, Jeff Miller, the NFL's Executive Vice President for Health and Safety Policy, acknowledged a link between football and degenerative brain disorders.[80] To some, this statement was an important (and perhaps the first) public acknowledgement by the NFL of such a link.[81] Nevertheless, by then (and for at least some time earlier), the NFL was carefully and appropriately citing to the opinions of medical experts.[82]

Fortunately, the lawsuits and public scrutiny seemed to have a positive effect on player health and safety, particularly concerning concussions and medications.

In 2011, the NFL's Head, Neck and Spine Committee (a wholesale replacement of the MTBI Committee) instituted a new Game Day Concus-

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[70] *See id.* at 148.

[71] *See Dent v. Nat'l Football League*, C 14-02324, 2014 WL 7205048 (N.D. Cal. Dec. 17, 2014).

[72] *See Dent v. Nat'l Football League*, 902 F.3d 1109 (9th Cir. 2018).

[73] *See Dent v. Nat'l Football League*, 384 F. Supp. 3d 1022 (N.D. Cal. 2019).

[74] *See id.* at 1030-33.

[75] *Dent v. Nat'l Football League*, 968 F.3d 1126 (9th Cir. 2020).

[76] *See Evans v. Arizona Cardinals Football Club*, 231 F. Supp. 3d 342 (N.D. Cal. 2017), *aff'd* 761 Fed. Appx. 701 (9th Cir. 2019).

[77] *Id.*

[78] *See Protecting and Promoting*, *supra* note 3, at 378-79.

[79] *See id.* at 28-29.

[80] *See id.*

[81] *See id.*

[82] *See id.*

sion Diagnosis and Management Protocol ("Concussion Protocol").[83] The 2011 Concussion Protocol required a standardized evaluation of players suspected of having suffered a concussion, encouraged a conservative approach to players returning to play and mandated that players be prohibited from returning to play if they were experiencing confusion; amnesia; headaches; nausea; or abnormal neurological findings, such as balance issues.[84]

In 2013, the Concussion Protocol was updated and expanded in response to a consensus statement from the world's leading medical experts on diagnosing and managing concussions in sports.[85] The 2013 Concussion Protocol defined a concussion, listed potential concussion signs and symptoms, required the use of a new sideline Standardized Concussion Assessment Tool ("SCAT2"), and required preseason baseline evaluations.[86] Moreover, the 2013 Concussion Protocol introduced the "Unaffiliated Neurotrauma Consultant," a medical expert assigned to each team for each game to assist in concussion evaluations, provided however that "[t]he responsibility for the diagnosis of concussions and the decision to return a player to a game remains exclusively within the professional judgment of the Head Team Physician[.]"[87] Lastly, the 2013 Concussion Protocol added a neutral athletic trainer (the "Booth ATC") sitting in a press box-level booth with multiple camera angles to assist teams in identifying players

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[83] *See NFL Head, Neck and Spine Committee's Concussion Protocol Overview*, NFL PLAYER HEALTH & SAFETY (June 22, 2018), https://www.playsmartplaysafe.com/newsroom/videos/nfl-head-neck-spine-committees-concussion-protocol-overview/ [https://perma.cc/S6NK-ELMQ].

[84] *See* NAT'L FOOTBALL ASS'N, *NFL Announces new Sideline Concussion Assessment Protocol*, https://www.nfl.com/news/nfl-announces-new-sideline-concussion-assessment-protocol-09000d5d81e78cc4 [https://perma.cc/3458-BFGF]; *See also* Adam Kilgore, *NFL's new concussion protocol can't protect players if teams won't follow it,* WASH. POST (Sept. 9, 2016), https://www.washingtonpost.com/news/sports/wp/2016/09/09/nfls-new-concussion-protocol-cant-protect-players-if-teams-wont-follow-it/ [https://perma.cc/ZT7J-D4EB].

[85] *See* Erin Flynn, *What is the NFL's Concussion Protocol?*, SPORTS ILLUSTRATED (Sept. 16, 2016), https://www.si.com/nfl/2016/09/16/nfl-concussion-protocol-policy-history [https://perma.cc/NMQ7-5RYY] (linking to Concussion Protocol as amended in 2013); *NFL's Head Neck & Spine Committee's Protocols Regarding Diagnosis and Management of Concussion*, NFL, http://static.nfl.com/static/content/public/photo/2013/10/01/0ap2000000254002.pdf [https://perma.cc/2TBZ-GUGC] [hereinafter *NFL's Head Neck & Spine Committee*] (last visited May 4, 2020), *citing* Paul McCrory et al., *Consensus Statement on Concussion in Sport: the 4th International Conference on Concussion in Sport Held in Zurich, November 2012*, 47 BR. J. SPORTS MED. 250 (2013).

[86] *See NFL's Head Neck & Spine Committee*, *supra* note 85, at 1-3.

[87] *See id.* at 4.

who potentially suffered a concussion.[88] Beginning in 2015, the Booth ATC has the power to stop play for a medical timeout by messaging the referee if the Booth ATC believes a player needs to be evaluated for a concussion.[89]

In 2017, the experts updated their consensus statement based on the latest research,[90] contributing to the NFL updating its Concussion Protocol prior to the 2018 season.[91] The 2018 Concussion Protocol added a third Unaffiliated Neurotrauma Consultant designated to monitor broadcast video feeds for players who possibly suffered a concussion, broadened the symptoms of concussion requiring evaluation for concussion and removal from play, and required follow-up concussion evaluations for players who underwent a concussion evaluation on a game day.[92] Also in 2018, the NFL instituted a comprehensive Return-to-Participation Protocol that players diagnosed with a concussion must undergo before they can return to play.[93]

Between 2011 and 2020, the NFL also improved its practices and policies concerning medications.[94] As of 2015, NFL clubs do not store or provide controlled substances to players.[95] Club doctors can still prescribe controlled substances to players, but the prescription is filled at a local pharmacy.[96] Some players retrieve the prescription themselves, but according to the NFL, "[m]any players . . . request that their clubs assist them by picking up their prescriptions from a local pharmacy for them, and in many cases the clubs agree to accommodate those requests as a matter of convenience for the player."[97] The prescription is recorded in the player's electronic medical records.[98] Aside from controlled substances however, club practices vary on

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[88] *See id.*

[89] *See ATC Spotters*, NFL Operations, https://operations.nfl.com/the-game/game-day-behind-the-scenes/atc-spotters/ [https://perma.cc/B77V-CEDV] (last visited May 4, 2020).

[90] *See generally* Paul McCrory et al., *Consensus Statement on Concussion in Sport: The 5th International Conference on Concussion in Sport, Held in Berlin, October 2016*, 51 Br. J. Sports Med. 838 (2018).

[91] *See NFL Head, Neck and Spine Committee's Concussion Protocol Overview*, NFL Player Health & Safety (June 22, 2018), https://www.playsmartplaysafe.com/newsroom/videos/nfl-head-neck-spine-committees-concussion-protocol-overview/ [https://perma.cc/S6NK-ELMQ].

[92] *See id.*

[93] *See NFL Return-to-Participation Protocol*, NFL Player Health & Safety (June 20, 2017), https://www.playsmartplaysafe.com/focus-on-safety/protecting-players/nfl-return-to-participation-protocol/ [https://perma.cc/WM75-UGSS].

[94] *See Protecting and Promoting*, *supra* note 3, at 143-49.

[95] *See id.* at 145.

[96] *See id.*

[97] *Id.*

[98] *See id.*

other prescription medications (such as Toradol), as well as over-the-counter painkillers – some clubs store and/or provide them to players while others do not.[99] Additionally, beginning with the 2015 season, visiting clubs are assigned a Visiting Team Medical Liaison, a local doctor who can help prescribe medications and advise concerning local medical facilities.[100] This role was added, at least in part, because, technically, club doctors were prohibited from providing medical services in states in which they were licensed.[101] This problem was further remediated by the passage of the Sports Medicine Licensure Clarity Act in 2018, which now generally permits team doctors and athletic trainers licensed in one state to provide medical care in states in which they are not licensed.[102]

Finally, between 2010 and 2016, the NFL made 25 rule changes directed towards making the game safer – far more than in any previous decade dating back to the 1950s.[103]

With that important context, we now turn to evaluating 2020 CBA changes which may have been influenced by FPHS's work.

III. 2020 CBA Changes with Connections to FPHS Work

This Section examines the provisions of the 2020 CBA regarding player health and safety and compares these provisions to the recommendations and analyses set forth in the FPHS publications identified above. As stated above, the NFL and the NFLPA incorporated and revised many initiatives, clauses, and programs as part of the 2020 CBA. Among others, some of the most significant changes were made to Article 39: Players' Rights to Medical Care and Treatment. This new-look Article 39 includes 13 new sections, ranging from behavioral health, sleep studies, and biospecimen collection to new specialists, committees, and programs. Some of the new provisions of Article 39 correlate, either directly or indirectly, to the work of the FPHS.

The extent to which the new or altered provisions of the 2020 CBA were the result of FPHS work is unknown. We did not ask the NFL or NFLPA about this, and it is doubtful either would have responded (or acknowledged such influence). Nevertheless, there are clear connections between the new CBA and the work of FPHS. This Section illuminates those connections.

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[99] *See id.*
[100] *See id.*
[101] *See id.* at 97, 146-47.
[102] *See* 15 U.S.C. § 8601 (2018).
[103] *See Protecting and Promoting*, *supra* note 3, at 203.

This Section will summarize changes in the 2020 CBA to the following areas: (a) club doctors and medical specialists; (b) health and safety committees; (c) wearable technologies and biospecimen collection; (d) behavioral and mental health; (e) transitioning out of the NFL; (f) club personnel: athletic trainers, strength and conditioning coaches, and equipment managers; and (g) miscellaneous other areas.

A. Club Doctors and Specialists

The authority of club doctors and their relationships with the clubs are central issues in the NFL player health landscape. Multiple Law and Ethics publications discuss concerns about the structure of club medical staff. The Law and Ethics Initiative focused on this issue more than any other and made its most comprehensive recommendations as a result. While the 2020 CBA made some small changes concerning club medical staff, those changes were not adequate. Given the centrality of this issue to player health, we explain the issue first, including the inadequate responses of the NFL and NFLPA, and then discuss the minimal – and insufficient – changes made in the 2020 CBA.

i. The Structural Conflict of Interest in Club Medical Staff

There is an inherent conflict of interest in the professional sports healthcare setting – specifically that club doctors are hired (or retained), reviewed, and potentially terminated by the club, even though they are providing healthcare to the players. The Law and Ethics Initiative first addressed this issue as part of its 493-page report, *Protecting and Promoting the Health of NFL Players: Legal and Ethical Analysis and Recommendations* ("*Protecting and Promoting*"), and centered on the issue in *The Role of Club Doctors* as part of a special issue in The Hastings Center Report, a bioethics journal.[104]

As explained in those publications, the current healthcare structure creates inherent problems in the treatment relationship. Club doctors provide care to players while also having some type of contractual or employment relationship with, and thus obligations to, the club.

The inherent conflict of interest is apparent from a full assessment of club doctors' responsibilities, including: (1) providing healthcare to the players; (2) helping players determine when they are ready to return to play; (3) helping clubs determine when players are ready to return to play; (4)

[104] *NFL Player Health: The Role of Club Doctors,* 46 The Hastings Ctr. 2 (Nov./Dec. 2016).

examining players whom the club is considering employing, *e.g.*, at the NFL Combine or as part of free agency; and (5) helping clubs determine whether a player's contract should be terminated because of the player's physical condition, *e.g.*, whether an injury will prevent the player from playing.[105] These responsibilities conflict with each other in that players and clubs often have conflicting interests, but club doctors are called to serve both parties.

As explained in *Protecting and Promoting*:

> Club doctors are clearly fundamental to protecting and promoting player health. Yet given the various roles just described, it is evident that they face an inherent structural conflict of interest. This is not a moral judgment about them as competent professionals or devoted individuals, but rather a simple fact of the current organizational structure of their position in which they simultaneously perform at least two roles that are not necessarily compatible.[106]

Chapter 2 of *Protecting and Promoting* recommends a comprehensive plan to restructure the club doctor's relationship in order to extinguish some of the conflicts.[107] In short, the report recommends that player care and treatment be provided by one set of medical professionals, appointed by a joint committee with representation from both the NFL and NFLPA, and evaluation of players for a club's business purposes should be done by separate medical personnel.

The NFL and NFLPA's responses to the recommendation were disappointing and, in part, even disturbing.

In its written response, the NFL objected to the recommendation.[108] Indeed, the NFL denied the existence of the structural conflict of interest that is the premise of the proposal, calling it merely "theorize[d]."[109] The Law and Ethics Initiative replied to the NFL in a letter, explaining the errors in the NFL's conclusions.[110] Similarly, the NFL Physicians Society

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[105] *See id.* at 96.

[106] *Id.* at 124.

[107] *See* Recommendation 2:1-A from *Protecting and Promoting*, *supra* note 3, at 128.

[108] *See* Letter from Jeffrey A. Miller, NFL, Executive Vice President, Health & Safety Initiatives, to Christopher R. Deubert, I. Glenn Cohen, and Holly Fernandez Lynch (Nov. 1, 2016), (on file with the Harvard Law School Library), available at https://footballplayershealth.harvard.edu/wp-content/uploads/2016/11/NFL-Response-to-Report-11.1.16.pdf.

[109] *See id.* at 12.

[110] *See* Letter from Christopher R. Deubert, I. Glenn Cohen, and Holly Fernandez Lynch to Jeffrey A. Miller, NFL, Executive Vice President, Health & Safety Initiatives (Nov. 10, 2016) (on file with the Harvard Law School Library), https://foot-

("NFLPS") called the conflict "theoretical" in a commentary as part of The Hastings Center Report.[111] That Report included an article by the Law and Ethics Initiative explaining its recommendation; commentaries from the NFLPS, a current player, a former player, a former player turned sports doctor, Dr. Ross McKinney, a law professor, and a bioethicist; and the Law and Ethics Initiative's reply to the NFLPS.[112]

While the Law and Ethics Initiative expected debate over the particulars of its recommendation, it was surprising that the NFL and NFLPS denied the existence of a conflict of interest outright.

Unfortunately, the NFLPA's response was no better. While the NFL accepted the Law and Ethics Initiative's invitation to publish a written response alongside *Protecting and Promoting*, the NFLPA did not. Moreover, following the report's release, the NFLPA did not comment on the substance of the recommendation, stating in response to at least one media inquiry "that it was too early to comment on the recommendations directly,"[113] despite the fact that the NFLPA had been provided a draft of the report – which included this recommendation – nine months earlier in February 2016.

Consequently, NFLPA Executive Director DeMaurice Smith's comments at the University of Houston Law Center on January 31, 2017,[114] in response to a question by Deubert, were the first time an NFLPA representative commented on the proposal. That exchange went as follows[115]:

> Deubert: I was wondering if the NFLPA thinks there's an inherent structural conflict of interest in having doctors . . . that treat players while also providing advice to the club, and if so, what does the NFLPA plan to do about it?

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ballplayershealth.harvard.edu/wp-content/uploads/2016/11/Authors-Reply-to-NFL-Response-11.10.16.pdf.

[111] *See* National Football League Physicians Society, Commentary, *NFL Physicians: Committed to Excellence in Patient-Player Car*e, 46 Hastings Ctr. Rep. S41 (2016), available at https://onlinelibrary.wiley.com/toc/1552146x/2016/46/S2.

[112] *See generally NFL Player Health: The Role of Club Doctors*, 46 Hastings Ctr. Rep. S2 (2016), available at https://onlinelibrary.wiley.com/toc/1552146x/2016/46/S2.

[113] Ike Swetlitz, *NFL Doctors' Conflicts of Interest Could Endanger Players, Report Says*, STAT (Nov. 17, 2016), https://www.statnews.com/2016/11/17/nfl-doctors-conflict-interest/ [https://perma.cc/REK4-QNFJ].

[114] *See* UH University Information Technology, *Medical and Legal Ethics in the NFL and Sports*, YouTube (Jan. 31, 2017), https://www.youtube.com/watch?v=Q2X6mZelr8Q.

[115] *Id.* at 1:05:25.

> Smith: Um, do I think that there could be a conflict of interest? Yes. Do I think that I would ever do anything to absolve the duty of an employer to provide a safe workplace? No. So I get the thought about whether we should have neutral doctors and whether or not we should somehow do something that removed the conflict of interest, but the reason why we have Hippocratic Oaths, the reason why people in this room, and I assume it's a mix of both students and lawyers, the reason why we raise our hand and take an oath of things like confidentiality to our clients, an oath that we are going to serve the interest of our clients, unilaterally, without anybody else, why do we do that? We do that because we recognize that each and every one of us are engaged in a profession, or should be engaged in a profession, where we have an exclusive duty, right? So my issue with doing anything to take that duty off of the back of a doctor, by accepting that there is somehow an unavoidable conflict of interest, is, that is the day, that we will start to remove the obligations of an employer to provide a safe workplace and health care to their employees. It's the exact same thing that happens at a coal mine when somebody at the coal mine goes to see one of the doctors. It's the exact same thing that happens at a university that has a student health plan, when somebody walks in and says, 'I'm sick.' The person at the student health center is employed by who? But we would never say that we need to come up with a committee of students and the university to create a neutral health care system. What would we say? We want doctors to act like doctors. We want doctors to obey their oaths. And if there's a conflict between a doctor and his Hippocratic Oath, maybe that's the day you shouldn't be a doctor again.

Smith provided a similar response at the Harvard Committee on Sports & Entertainment Law's Symposium on Legal and Ethical Issues Affecting NFL Player Health on March 7, 2017. At the Symposium, Deubert asked Smith, in sum and substance, why players receive independent treatment for concussions but not for other injuries. Smith answered the question by highlighting what Smith believed are doctors' obligations under the Hippocratic Oath, and that NFL players are entitled to second medical opinions.[116]

Smith's responses were inadequate and incorrect in five key ways.

First, to the extent Smith was arguing that the conflict is not omnipresent, in 2009, the then-titled Institute of Medicine ("IOM") released a report entitled *Conflict of Interest in Medical Research, Education, and Practice* that addressed exactly this issue.[117] The IOM report defined conflicts of interest as "circumstances that create a risk that professional judgments or actions regarding a primary interest will be unduly influenced by a secon-

[116] Chris Deubert, DC United, *Harvard Committee on Sports & Entertainment Law Sympsium: Legal and Ethical Issues Affecting NFL Player Health* (March 7, 2017).

[117] *See generally* Inst. Med., Conflict of Interest in Medical Research, Education, and Practice (2009), *available at* https://www.nap.edu/catalog/12598/conflict-of-interest-in-medical-research-education-and-practice.

dary interest."[118] Once a conflict of interest is established, then the relevant parties can assess the severity and determine appropriate management of the conflict.[119] This position is in line with the leading views in the bioethics community.[120] Thus, Smith's statement that there "could" be a conflict of interest is incorrect. There is a conflict.

Moreover, as highlighted in the Law and Ethics Initiative's reply letter to the NFL, there is an overwhelming body of bioethical and legal literature agreeing with this perspective, recognizing the inherent structural conflict of interest in having medical staff treat players while also having relationships with and obligations to sports clubs.[121] In contrast to this extensive literature, there is no known expert analysis that either supports the denial of the existence of the present structural conflict of interest or defends the current arrangement as ethically optimal.

Second, Smith claimed that the recommendation would "absolve" NFL clubs of their obligation "to provide a safe workplace." While it is not clear what obligation Smith was referencing, the Occupational Safety and Health Act ("OSH Act") does require employers to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm

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[118] *Id.* at 45-46.

[119] *See id.* at 52-61; 80-87.

[120] *See* Matthew S. McCoy & Ezekiel J. Emanuel, *Why There Are No "Potential" Conflicts of Interest*, 317 JAMA 1721 (2017).

[121] *See* Dominic Malcolm, *Confidentiality in Sports Medicine*, 35 CLIN. SPORTS MED. 205 (2016); Brad Patridge, *Dazed and Confused: Sports Medicine, Conflicts of Interest, and Concussion Management*, 11 J. BIOETHICAL INQUIRY 65 (2014); Ron Courson et al., *Inter-Association Consensus Statement on Best Practices for Sports Medicine Management for Secondary Schools and Colleges, 49* J. ATHLETIC TRAINING 128 (2014); Daniela Testoni et al., *Sports Medicine and Ethics*, 13 AM. J. BIOETHICS 4 (2013); Nancy M.P. King & Richard Robeson, *Athletes Are Guinea Pigs*, 13 AM. J. BIOETHICS 13 (2013); Bruce H. Greenfield & Charles Robert West, *Ethical Issues in Sports Medicine: A Review and Justification for Ethical Decision Making and Reasoning*, 4 SPORTS PHYSICAL THERAPY 475 (2012); Brian Meldan Devitt & Conor McCarthy, *'I am in Blood Stepp'd in So Far. . .': Ethical Dilemmas and the Sports Team Doctor*, 44 BR. J. SPORTS MED. 175 (2010); Warren R. Dunn et al., *Ethics in Sports Medicine*, 35 AM. J. SPORTS MED. 840 (2007); Barry R. Furrow, *The Problem of the Sports Doctor: Serving Two (Or is it Three or Four?) Masters*, 50 ST. LOUIS U. L.J. 165 (2005); Steve P. Calandrillo, *Sports Medicine Conflicts: Team Physicians v. Athlete-Patients*, 50 ST. LOUIS U. L.J. 185 (2005); Matthew J. Mitten, *Team Physicians as Co-Employees: A Prescription that Deprives Professional Athletes of an Adequate Remedy for Sports Medicine Malpractice*, 50 ST. LOUIS U. L.J. 211 (2005); Charles V. Russell, *Legal and Ethical Conflicts Arising from the Team Physician's Dual Obligation to the Athlete and Management*, 10 SETON HALL LEGIS. J. 299 (1987); Thomas H. Murray, *Divided Loyalties in Sports Medicine*, 12 PHYSICIAN & SPORTS MED. 134 (1984).

to his employees[.]"[122] In fact, the application of the OSH Act to the NFL is discussed at length in another paper by the Law and Ethics Initiative.[123] Nevertheless, nothing about the Law and Ethics Initiative's recommendation would do anything to absolve NFL clubs of their obligations under the OSH Act or any other legal framework. The recommendation does nothing to change the employer-employee relationship between clubs and players and thus does not affect any obligations NFL clubs have as employers.

Third, Smith suggested that the recommended changes were unnecessary because club doctors have an "exclusive duty" to players pursuant to codes of ethics. While Smith mentioned the Hippocratic Oath, neither the original version[124] nor the modern version used by many medical schools[125] provide that doctors have an "exclusive duty" to their patients. Moreover, the American Medical Association ("AMA") Code of Medical Ethics ("AMA Code") also does not require doctors to have an "exclusive" duty or obligation to patient welfare.[126]

Nevertheless, giving the benefit of the doubt, Smith may have been referring to the AMA Code's decree that:

> The relationship between patient and physician is based on trust, which gives rise to physicians' ethical obligations to place patients' welfare above the physician's own self-interest or obligations to others, to use sound medical judgment on patients' behalf, and to advocate for their patients' welfare.[127]

The code of ethics for the Féderation Internationale de Médicine du Sport ("FIMS"), the leading international sports medicine organization, contains similar provisions.[128]

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[122] 29 U.S.C. § 654(a)(1) (2018).

[123] *See* Adam M. Finkel et al., *The NFL as a Workplace: The Prospect of Applying Occupational Health and Safety Laws to Protect NFL Workers*, 60 Ariz. L. Rev. 291 (2018).

[124] *See* Rachel Hajar, *The Physician's Oath: Historical Perspectives*, 18 Heart Views 154 (2017).

[125] *See id.*

[126] *See* Council on Ethical and Judicial Affairs, AMA, Code of Medical Ethics, available at https://www.ama-assn.org/about-us/code-medical-ethics [https://perma.cc/ST53-PW35].

[127] AMA Code Opinion 1.1.1 – Patient-Physician Relationship.

[128] *See Code of Ethics*, FIMS http://www.fims.org/about/code-ethics/ [https://perma.cc/G6WF-RUED] (last visited Feb. 15, 2017) (on file with the Harvard Law School Library), at ¶ 1 ("The same ethical principles that apply to the practice of medicine shall apply to sports medicine. The main duties of a physician include: Always make the health of the athlete a priority. Never do harm. Never impose your

In addition to these codes of ethics, the 2011 CBA contained a provision governing the club doctor's standard of care:

> [E]ach Club physician's primary duty in providing medical care shall be not to the Club but instead to the player-patient. This duty shall include traditional physician/patient confidentiality requirements. In addition, all Club physicians and medical personnel shall comply with all federal, state, and local requirements, including all ethical rules and standards established by any applicable government and/or other authority that regulates or governs the medical profession in the Club's city.[129]

However, as explained in *Protecting and Promoting*, this CBA provision is susceptible to multiple interpretations.[130] On a generous reading (that is, one that does not give the words "in providing medical care" any special emphasis), club doctors' primary duty is to the player at all times. On a less generous reading, the CBA provision demands a primary duty to the player-patient *only* when the club doctor is "providing medical care," and it is inapplicable when the club doctor is rendering services to the club. However, given how club doctors are currently situated within the club, the two roles assigned to them cannot be truly separated, and their duties cannot possibly be exclusively to the players. Providing care to the player occurs simultaneously with performing duties for the club by judging the player's ability to play and help the club win.

Thus, the CBA requires the club doctor to provide medical care that puts the player-patient's interests above those of the club (in the event that these interests conflict). This is as it should be. However, in most instances—and as the CBA seemingly recognized—it is impossible under the current structure for the club doctor to always have a primary duty to the player-patient over the club because sometimes the club doctor is not providing care, but rather is advising the club on business decisions. In other words, the club doctor cannot always hold the player's interests as paramount and at the same time abide by his or her obligations to the club. Indeed, a club doctor could provide impeccable player-driven medical care (treating the player-patient as primary, in accordance with the CBA) while simultaneously hurting a player's interests by advising the club that the player's injury will limit his ability to help the club. Thus, under any reading of the CBA provision, players lack a doctor who is concerned only with their best interests at all times.

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authority in a way that impinges on the individual right of the athlete to make his/her own decisions.").

[129] 2011 CBA, *supra* note 7, at Art. 39, § 1(c).

[130] *See Protecting and Promoting*, *supra* note 3, at 125.

Aside from the problems with the CBA provision, Smith's position conflicts with other evidence. *Protecting and Promoting* includes multiple quotes and anecdotes from former and current NFL players who believed or do believe that the club medical staff was or is – at least some of the time – placing the club's interests ahead of their own.[131] Indeed, in 2013, the NFLPA stated that a survey it had conducted revealed that 78% of players do not trust club medical staffs.[132] An Associated Press survey also found troubling results.[133] Even if a club doctor can manage the conflicts, their mere existence can compromise player trust, which is a critical element of the doctor-patient relationship. This is what it means for the conflict to be inherent; the conflict is rooted in the perceptions of others as much as in the decisions and actions of the conflicted party. It is the *system* that deserves blame, not individual doctors.

Fourth, Smith suggested that the recommendation is unnecessary by comparison – there are many situations in which employers provide doctors for their employees and there is no objection to such situations. For sure, there are many workplaces in addition to the NFL where employers provide healthcare to their employees. Many doctors provide care to employees in a variety of occupational settings, such as the military, law enforcement, and factories and other industrial settings. In these settings as well, doctors can be conflicted between doing what is best for the employee and what is best for the employer. However, a review of the legal and ethical literature on occupational medicine did not reveal any clear resolution or guidance with bearing on the context of professional sports medicine. Simply put, just because this problem exists in other employment settings does not make it right in the NFL.

Fifth, Smith claimed that the recommended changes were unnecessary because players are entitled to second medical opinions under the CBA. NFL players' right to a second medical opinion paid for by the club is a valuable and important right.[134] However, second medical opinions are just that – a

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[131] *See id.* at 117-18.

[132] *See* Marc Sessler, *NFLPA: 78 Percent of Players Don't Trust Team Doctors*, NFL (Jan. 31, 2013), https://www.nfl.com/news/nflpa-78-percent-of-players-don-t-trust-team-doctors-0ap1000000133534 [https://perma.cc/L7J9-HY8C].

[133] *See* Howard Fendrich & Eddie Pells, *AP Survey: NFL Players Question Teams' Attitudes on Health,* Associated Press (Jan. 30, 2016), https://apnews.com/article/66d9e9b4a4684ea2882db8423f6dff98 [https://perma.cc/AA5V-NVFW] (surveying one hundred current NFL players and posing the question whether "NFL teams, coaches and team doctors have players' best interests in mind when it comes to injuries and player health[,]" with forty-seven players answering yes, thirty-nine answering no, and fourteen either unsure or refused to respond).

[134] *See Protecting and Promoting*, *supra* note 3, at 179-83.

secondary level of care. While many players take advantage of this right, it seems likely that at least some players – particularly younger players – are reluctant to take advantage of this right for fear of angering the club and its medical staff. Players should receive independent medical care in the first instance. Indeed, this is largely the practice concerning the treatment of concussions. The value of independent examination and treatment has been recognized in the Concussion Protocol and should be extended to all player care situations.

ii. The 2020 CBA and Club Medical Staff

The 2020 CBA did not eliminate the above-mentioned conflicts but did make some changes in an apparent attempt to mitigate them. Article 39, Section 1(a) was amended to mandate that either a club's Head Team Orthopedist[135] or its Head Team Primary Care Sports Medicine Physician, established in the 2011 CBA, shall be designated as the "Head Team Physician."[136] With this position comes important and newly described authority. According to Article 39, Section 1(d), "either the Head Team Orthopedist or the Head Team Primary Care Sports Medicine Physician, as applicable, *shall have the exclusive and final authority to determine whether a player is cleared to return to participation in football activities*" (emphasis added).[137] This authority is further supported by a provision stating that club personnel "shall in no event take any measures inconsistent with players' medical care and management overseen by the Head Team Physicians." If the Head Team Physician determines that any such areas involve medical care and management, the Head Team Physician shall have the final authority to make, modify or override decisions in such areas."[138] On paper, these changes ensure that club doctors are always providing healthcare in the players' interests rather than those of the club. Nevertheless, the inherently conflicted employment or contractor structure discussed at length above remains and thus it is questionable whether these changes are meaningful.

Indeed, another change to the 2020 CBA casts doubt on the extent to which the NFL and NFLPA are committed to providing players with a healthcare environment in which the players' interests are always placed first. Article 39, Section 1(e) of the 2020 CBA, entitled "Medical Providers

[135] Capitalized terms not defined herein have the same meaning as used in the 2020 CBA.

[136] *See* 2020 CBA, *supra* note 16, at Art. 39, § 1(a).

[137] *See id.* at Art. 39, § 1(d).

[138] *Id.*

and Allegiance," discusses the duty of the club's medical personnel.[139] This section is substantially similar to Article 39, Section 1(c) of the 2011 CBA, which was titled "Doctor-Patient Relationship." However, there is one meaningful difference between the two sections. When discussing the duty of club medical personnel, the 2011 CBA declared that "[t]his duty shall include traditional physician/patient confidentiality requirements."[140] Oddly, in reviewing a draft of *Protecting and Promoting*, the NFL denied that the 2011 CBA provision "requires the traditional patient-physician confidentiality requirements of a private system" despite its explicit language.[141] Perhaps it is then not surprising that this line is noticeably absent from the 2020 CBA.

The NFL and NFLPA seemingly (and tellingly) no longer want to describe the club doctor-player relationship as a traditional doctor-patient relationship. As pointed out in *Protecting and Promoting*,[142] the 2011 CBA provision establishing the traditional physician-patient confidentiality requirements requires that the care relationship between players and club doctors be afforded "traditional" confidentiality protections.[143] However, clubs request or require players to execute collectively bargained waivers, effectively vitiating this requirement, and players who were interviewed for FPHS work indicated that no player refuses to sign the waiver.[144] Players are effectively compelled to waive certain legal rights concerning their health without meaningful options. There is no doubt that players execute the waivers because they fear that if they do not, they will lose their jobs.

Indeed, the waivers (which are collectively bargained between the NFL and NFLPA) permit the athletic trainer and club doctors to disclose the player's medical information to club employees, such as coaches and the general manager.[145] Thus, it is unclear what work this CBA language was doing. The 2020 CBA removes any pretense of a traditional physician/patient relationship, to the detriment of the players.[146]

Finally, in the area of medical professionals, the 2020 CBA makes changes to the type of medical consultants that clubs must retain. Both the 2011 and 2020 CBAs mandate that each club retain consultants in the following areas: (i) neurological (head trauma); (ii) cardiovascular; (iii) nutri-

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[139] *See id.*
[140] *See* 2011 CBA, *supra* note 7, at Art. 39, § 1(c).
[141] *See Protecting and Promoting*, *supra* note 3, at 99.
[142] *See id.*
[143] *See* 2011 CBA, *supra* note 7, at Art. 39, § 1(c).
[144] *Protecting and Promoting*, *supra* note 3, at 99.
[145] These waivers are discussed at length in Section III.D.iv – Confidentiality.
[146] *See generally* 2020 CBA, *supra* note 16, at Art. 39.

tion; and (iv) neuropsychology.[147] The 2020 CBA adds two new types of required consultants: a behavioral health specialist and a pain management specialist.[148]

Both new specialists address issues raised in FPHS work. The Behavioral Health Specialist will be discussed further in Section III.D. – Behavioral and Mental Health. As for the need for a Pain Management Specialist, in Section II above, we discussed the multiple lawsuits brought by former NFL players alleging that the NFL and its clubs had previously mishandled pain management and related medications. Additionally, an FPHS medical study found that 28% of former players suffered from chronic pain.[149] These issues were examined at length in a special section of *Protecting and Promoting*, concluding with a finding that "[t]he evidence available to us, though admittedly far from complete, suggests that the misuse and abuse of medications is largely a thing of the past and that, by and large, current practices involving medications comply with legal and ethical obligations."[150] Nevertheless, the report also explained that "it is important that the NFL and the club doctors continue to evaluate practices concerning medications, including but not limited to how much they are being used, what types are being used and for what purposes, under what circumstances they are being used, their risks and effectiveness, prescriptions for and documentation of their use, and players' understanding of and consent to their use."

The Pain Management Specialist should help address the issues highlighted in the FPHS work. The Pain Management Specialist must have a minimum of five years post-residency and be board-certified in anesthesiology, emergency medicine, family medicine, psychiatry, physical medicine and rehabilitation, or neurology.[151] Moreover, a physician nominated to serve as a club's Pain Management Specialist must actively engage in pain management (at least 25% of her/his practice) as certified by the chairperson of the hospital at which they practice.[152]

In addition to the Pain Management Specialist, the 2020 CBA establishes a Joint Pain Management Committee, consisting of the NFLPA Medical Director and the NFL Chief Medical Officer.[153] The Committee is tasked

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[147] *See* 2011 CBA, *supra* note 7, at Art. 39, § 1(b)(i)-(iv); 2020 CBA *supra* note 16, Art. 39, § 1(b)(i)-(iv).

[148] *See* 2020 CBA, *supra* note 16, at Art. 39, § 1(b)(v) and (vi).

[149] *See* Timothy W. Churchill et al., *Weight Gain and Health Affliction Among Former National Football League Players*, 131 Am. J. Med. 1491 (2018).

[150] *See Protecting and Promoting*, *supra* note 3, at 149.

[151] *See* 2020 CBA, *supra* note 16, at Art. 39, § 20(c).

[152] *See id.*

[153] *See id.* at Art. 39, § 20(a).

with: "[i]mplement[ing] 'best practices' education protocols and guidelines for pain medication administration and patient engagement for club medical staffs"; "[d]evelop[ing] and implement standardized player education about the use of pain medication"; "[c]onduct[ing] joint-research into pain management, addiction, personalized medicine and alternative therapies"; and "[c]onduct[ing] surveys of clubs and players regarding pain, fatigue, recovery and related services."[154]

The 2020 CBA also creates the Prescription Drug Monitoring Program (the "Program").[155] The Program, through the Joint Pain Management Committee, is intended "to provide guidance and establish uniform standards addressing club practices and policies regarding pain management and use of prescription medication by NFL players, including the administration of certain federally scheduled drugs."[156] Moreover, the Program "will monitor all prescriptions issued to NFL players in all 32 clubs by club physicians and unaffiliated physicians."[157] The Program includes: (i) "[a]n electronic database that tracks de-identified data on all prescriptions dispensed to NFL players by club medical staff and unaffiliated physicians"; (ii) requirements that clubs update the database monthly; (iii) requirements that players report all prescription medications they are taking; and (iv) regular reports from the Program about player prescription usage.[158] Moreover, the 2020 CBA provides an enforcement process through which potential violations of the Program are to be promptly investigated and, if no agreement on the facts is reached between the NFL and NFLPA, can be appealed to the Impartial Arbitrator,[159] a neutral arbitrator otherwise designated to resolve disputes between arising under the CBA.[160] Possible punishment ranges from remedial education to fines and potential loss of draft picks.[161]

The totality of these improvements on pain management are welcome and should help ensure that players receive pain and prescription medications only as necessary and with full disclosure of the risks and benefits. Moreover, they should also help players increasingly avoid reliance on such medications.

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[154] *See id.*
[155] *See id.* at Art. 39, § 20(b).
[156] *See id.* at Art. 39, § 20(a).
[157] *See id.* at Art. 39, § 20(b).
[158] *See id.* at Art. 39, § 20(b)(i)-(iv).
[159] *See id.* at Art. 39, § 20(d).
[160] *See id.* at Art. 16.
[161] *See id*.

B. Health and Safety Committees

The 2020 CBA sets forth a considerable list of health and safety committees and related subcommittees. Specifically, the 2020 CBA includes the: (1) Accountability and Care Committee ("ACC"); (2) NFL Health and Safety Executive Committee; (3) General Medical Committee; (4) Musculoskeletal Committee; (5) Head, Neck and Spine Committee; (6) Pain Management Committee; (7) Comprehensive Mental Health and Joint Behavioral Health Committee; (8) Field Surface Safety & Performance Committee; and (9) Engineering and Equipment Safety Committee. Many (if not all) of these committees existed prior to the 2020 CBA but are now codified as part thereof. By comparison, the 2011 CBA only referenced two committees: the Joint Committee on Player Safety and Welfare ("Joint Committee") and the ACC, as will be discussed further below.

The creation or codification of these committees aligns with recommendations made in *Protecting and Promoting*. Recommendation 7:1-B recommended that "[t]he NFL and NFLPA should continue to undertake and support efforts to scientifically and reliably establish the health risks and benefits of playing professional football."[162] Next, Recommendation 7:1-C recommended that "[t]he NFL, and to the extent possible, the NFLPA, should: (a) continue to improve its robust collection of aggregate injury data; (b) continue to have qualified professionals analyze the injury data; and, (c) make the data publicly available for re-analysis."[163] The above-described committees should substantially satisfy these recommendations, with the notable exception of permitting public scrutiny of their work.

Turning back to the Joint Committee and the ACC, *Protecting and Promoting* described the inadequacies of both. Under the 2011 CBA, both the Joint Committee and the ACC initially appeared to be avenues through which players could raise concerns they had about health and safety issues. However, the authority of these committees was unclear. As explained in *Protecting and Promoting*, "[t]he Joint Committee has the authority to initiate an investigation run by neutral doctors, but the Joint Committee is only obligated to 'act[ ] upon' the doctors' recommendations, which is somewhat vague. It is unclear what it means for the Joint Committee to 'act[ ] upon' the recommendations and there is nothing binding the NFL or the clubs to 'act[ ] upon' the doctors' recommendations."[164] Further, *Protecting and Promoting* described "[t]he ACC [a]s even weaker than the Joint Committee.

[162] *Protecting and Promoting*, *supra* note 3, at 231-32.
[163] *Id.* at 232.
[164] *See id.* at 241.

The ACC merely refers complaints to the NFL and the club involved and the NFL and the club are then free to 'determine an appropriate response.'"[165] Consequently, *Protecting and Promoting* recommended that "[t]he purpose of certain health-related committees should be clarified and their powers expanded."[166]

The 2020 CBA responds to these concerns. First, the parties made mild improvement in the area of enforcement. Whereas under the 2011 CBA a player complaint was submitted by the ACC only to the NFL and the club for resolution, the 2020 CBA now requires that the NFLPA be included in determining "an appropriate response or corrective action."[167]

Next, the composition of the committees under the 2020 CBA is responsive to *Protecting and Promoting*'s recommendations that the committees' roles be "clarified" and "expanded." Previously, the Joint Committee's breadth of duties included "discussing the player safety and welfare aspects of playing equipment, playing surfaces, stadium facilities, playing rules, player-coach relationships, and any other relevant subjects."[168] The Joint Committee no longer exists and its previous duties have been dispersed among the more specific committees listed above. This revised structure should provide more clarity and focus.

The ACC also underwent some notable changes. Previously, one of the ACC's principal responsibilities was to conduct a confidential player survey to solicit the players' input and opinions regarding the adequacy of medical care provided by their respective medical and training staffs.[169] This survey was supposed to be conducted every two years.[170] However, the first survey took four years to be conducted.[171] The 2020 CBA bows to this failure of punctuality by only requiring the survey to be conducted once every three years.[172]

There is, however, one positive change concerning the ACC's player survey. *Protecting and Promoting* recommended that de-identified, aggregate results of the survey be made public to permit further analysis.[173] The 2020

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[165] *Id.*
[166] *Id.*
[167] *See* 2020 CBA, *supra* note 16, at Art. 39, § 5(d).
[168] *See* 2011 CBA *supra* note 7, at Art. 50, § 1(a).
[169] *See id.* at Art. 39, § (3)(c)(iv).
[170] *See id.*
[171] *See Protecting and Promoting*, *supra* note 3, at 233.
[172] *See* 2020 CBA, *supra* note 16, at Art. 39, § 5(c)(iv); 2011 CBA, *supra* note 7, at Art. 39, § 3(c)(iv).
[173] *See Protecting and Promoting*, *supra* note 3, at 233-34.

CBA substantially adopts this recommendation, by requiring the ACC to "commission independent analyses of the results of such surveys."[174]

The ACC has otherwise taken on new responsibilities which speak to the Recommendations of 7:1-B and 7:1-C for more robust collection and analysis of data concerning injuries and the risks of playing football.[175] As an initial matter, the ACC is responsible for "[c]onduct[ing] research into prevention and treatment of illness and injury commonly experienced by professional athletes, including patient care outcomes from different treatment methods."[176] Moreover, the ACC will create a subcommittee that will analyze injury information and data from performance tracking technology to study training methods, practices, and drills that may lead to injuries.[177] This subcommittee will focus on training camp and preparation for training camp, including without limitation any conditioning testing, and whether offseason workout and training camp loads affect regular season performance and injury rates.[178] The subcommittee will then attempt to make recommendations or identify best practices that NFL players and clubs may follow to ensure players are both sufficiently conditioned, including evaluating any club conditioning tests, and prepared for the start of the Offseason Program and training camp, including a training camp "Acclimation Period."[179]

The ACC has also taken on a task recommended by the Law and Ethics Initiative. Recommendation 2:1-G recommended that "[a]t any time prior to the player's employment with the club, the player should be advised in writing that the club doctor is performing a fitness-for-play evaluation on behalf of the club and is not providing any medical services to the player."[180] The purpose of this recommendation was to resolve confusion that sometimes arises about the club doctor's role.[181] As part of the 2020 CBA, the ACC is charged with "[d]evelop[ing] a standardized preseason and postseason physical examination and educational protocol to inform players of the primary risks associated with playing professional football and the

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[174] *See* 2020 CBA, *supra* note 16, at Art. 39, § 5(c)(iv).
[175] *See Protecting and Promoting*, supra note 3, at 231-32.
[176] *See* 2020 CBA, *supra* note 16, at Art. 39, § 5(c)(iii).
[177] *See id.* at Art. 39, § 5(g).
[178] *See id.*
[179] *See id.* The results of the subcommittee's analysis will be available to the NFL and the NFLPA but will not be publicly disseminated unless authorized pursuant to the NFL Player Scientific & Medical Research Protocol, as set forth in Section 18 of this Article and Appendix X of this Agreement.
[180] *See Protecting and Promoting*, *supra* note 3, at 139.
[181] *See id.*

role of the player and the team medical staff in preventing and treating illness and injury in professional athletes."[182]

The ACC's new duties continue, including to: "[e]ncourage and support programs to ensure outstanding professional training for team medical staffs"; "[a]ssist in the development and maintenance of injury surveillance and medical records systems"; "[d]evelop and issue joint position statements on health and safety issues relevant to and impacting professional football players (*e.g.*, CTE, concussion, lower extremity injuries)"; "[a]nnually review and develop a mandatory education program concerning health and safety issues relevant to NFL players, including but not limited to, concussion, CTE, and NFL injury data, to be presented to all NFL players by the parties throughout the course of each NFL Season"; "[a]nalyze and provide recommendations regarding injury trends"; "[c]oordinate public statements by the NFL, NFLPA, clubs and other interested parties regarding football-related health and safety issues"; "[c]onduct an annual comprehensive review of club rehabilitation equipment, facilities and modalities, and thereafter establish and implement minimum standards concerning these areas"; "[r]eview any proposed playing rules changes for health and safety impact"; and "[e]xamine any subject related to player safety and welfare it desires, and make non-binding recommendations to the parties."[183]

C. Wearable Technologies and Biospecimen Collection

In an increasingly connected and data-driven world, privacy has been a topic of much discussion and controversy.[184] Sports too have been deeply involved in these issues.[185] In *Evaluating NFL Player Health and Performance: Legal and Ethical Issues* ("*Evaluating*"), a 2017 University of Pennsylvania Law Review article, the Law and Ethics Initiative examined the increasing use of wearable technologies in the NFL workplace and the potential impli-

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[182] *See* 2020 CBA, *supra* note 16, at Art. 39, § 5 (c)(ii).

[183] *See* 2020 CBA, *supra* note 16, at Art. 39, § 5(c)(v)-(xi).

[184] Daniel Rudofsky, *Modern State Action Doctrine in the Age of Big Data*, 71 N.Y.U. ANN. SURV. AM. L. 741 (2017); *Developments in the Law — More Data, More Problems*, 131 HARV. L. REV. 1715, 1722 (2018).

[185] *See* Barbara Osborne & Jennie Cunningham, *Legal and Ethical Implications of Athletes' Biometric Data Collection in Professional Sport*, 28 MARQ. SPORTS L. REV. 37 (2017); Kristy Gale, *Evolving Sports Technology Makes its Mark on the Internet of Things: Legal Implications and Solutions for Collecting, Utilizing, and Disseminating Athlete Biometric Data Collected Via Wearable Technology*, 5 ARIZ. ST. SPORTS & ENT. L. J. 337 (2016); Anthony Studnicka, *The Emergence of Wearable Technology and the Legal Implications for Athletes, Teams, Leagues and Other Sports Organizations Across Amateur and Professional Athletics*, 16 DEPAUL J. SPORTS L. 195 (2020).

cations under the Americans with Disabilities Act ("ADA") and Genetic Information Nondiscrimination Act ("GINA").[186] The article included an appendix describing 13 wearable technologies used by NFL clubs, including those which measure agility, force (created and sustained), speed, location, "readiness," heart rate, sleep, body temperature, fatigue, hydration, power, and more.[187] These technologies can provide valuable health and performance information to assist a player both on and off-the-field, but they can also be intrusive and provide NFL clubs with information which can be used against the players.

The authors of *Evaluating* explained the surprising results of their work as follows:

> When we began working on this project, we imagined its chief import would be to help determine which, if any, of the *new* types of wearable technologies and genetic testing that are being considered or currently used in the NFL (among other professional sports leagues) violate existing laws, in particular GINA and the ADA. This concern remains an important part of the project, but we were surprised in our research: first on the way in which the testing of professional sports players violates or accords with these laws and second, to learn that even more basic and "lower tech" testing mechanisms that have been in place for a long time in the NFL may be problematic.[188]

Moreover, many of these concerns arose from long-standing practices at the NFL Combine, an annual process through which recent college football players are evaluated prior to the NFL Draft. As a result of these findings, the authors recommended the following: improved compliance with existing laws; clarity from regulators on the appropriate application of certain laws to the relative uniqueness of the NFL workplace; the elimination of practices which have the effect (if not the purpose) of circumventing certain laws; and changes to existing legislation.

While the 2020 CBA did not address the Combine-related concerns discussed in *Evaluating*, it did otherwise address, in part, the issues by adding multiple provisions, including provisions governing sleep studies and sensors, and biospecimen collection. We discuss each set of provisions in turn.

The 2020 CBA permits clubs to perform "Sleep Studies," which are defined as "any effort to test, monitor, observe, analyze or collect informa-

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[186] *See* Jessica L. Roberts et al., *Evaluating NFL Player Health and Performance: Legal and Ethical Issues*, 165 U. PA. L. REV. 227 (2017) [hereinafter *Evaluating*].

[187] *See id.* at App. B.

[188] *See id.* at 300.

tion on or in connection with the sleep activity of an NFL player or players, without limitation, through the use of wearable sleep trackers and any future iterations thereof," subject to certain limitations.[189] First, any club desiring to perform a Sleep Study must hire a qualified third-party company to conduct the Sleep Study.[190] Second, Sleep Studies may only be conducted during Organized Training Activities or preseason training camps.[191] Sleep Studies may not be performed at any other time during the year unless approved, in writing, by the NFLPA.[192] Third, player participation in any Sleep Study is strictly voluntary – clubs may not require player participation in a Sleep Study.[193] Fourth, each participating player shall own his individual data collected during participation in the Sleep Study.[194] Fifth, the data and information collected from a player participating in a Sleep Study may not be shared with or transferred to the club unless or until such player provides informed written approval of such transfer.[195] Sixth, information arising from a Sleep Study and transferred to the club shall not be used by the club or any third-party for any purpose other than supporting player health and/or performance through improving sleep habits.[196] Seventh, clubs intending to conduct a Sleep Study must notify the NFL of their intention to do so, indicating the intended date(s) of the testing, identifying the third-party company retained to conduct such testing, and forwarding a copy of the player consent form to be used in connection with the testing. These rules do not address the legal concerns raised in *Evaluating* but do provide important legal and bioethical protections for players.

Next, performance-based sensors raise much of the same privacy concerns as Sleep Studies. "Sensors," under the 2020 CBA, are defined as "any

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[189] *See* 2020 CBA, *supra* note 16, at Art. 39, § 13.

[190] *See id.* at Art. 39, § 13(a).

[191] *See id.* at Art. 39, § 13(b).

[192] *See id.*

[193] *See id.* at Art. 39, § 13(c).

[194] *See id.* at Art. 39, § 13(d).

[195] *See id.* at Art. 39, § 13(e). If a player gives such consent, the resulting data will only be shared with the club medical, sports performance and athletic training staffs. Notwithstanding the foregoing, a club may require a player to provide written consent for the transfer of his individual Sleep Study data as a prerequisite to the club paying for the player's participation in the Sleep Study. Such consent, once given, may not be rescinded.

[196] *See id.* at Art. 39, § 13(f). If a player consents to transfer data to his club, the receiving club shall not transfer player data to the NFL, any other NFL club, or other third-party. Any and all data/information collected during a Sleep Study must remain separate from and not be entered into or used in connection with a player's electronic medical record.

sensor, device or tracking device worn by an individual player used to collect, monitor, measure or track any metric from a player (*e.g.*, distance, velocity, acceleration, deceleration, jumps, changes of direction, player load), biometric information (*e.g.*, heart rate, heart rate variability, skin temperature, blood oxygen, hydration, lactate, and/or glucose), or other health, fitness and performance information."[197]The 2011 CBA provided that:

> [t]he NFL may require all NFL players to wear during games and practices equipment that contains sensors or other nonobtrusive tracking devices for purposes of collecting information regarding the performance of NFL games, including players' performances and movements, as well as medical and other player safety-related data. Sensors shall not be placed on helmets without the NFLPA's consent. Before using sensors for health or medical purposes, the NFL shall obtain the NFLPA's consent.[198]

The 2020 CBA considerably expands these sensor-related rules. Under the new CBA, "[t]he NFL may require all NFL players to wear during games equipment that contains Sensors for purposes of collecting information regarding the performance of NFL games, including players' performances and movements."[199] However, sensors of any type shall not be placed on helmets without the NFLPA's consent.[200] The data collected from sensors can be used during NFL games commercially, including, but not limited to, with broadcast partners, subject to providing advance notice to the NFLPA of such use.[201]

In addition, the 2020 CBA stipulates that the NFL and the NFLPA shall create a "Joint Sensors Committee" to review and approve Sensors for NFL and club use.[202] The Joint Sensors Committee shall be tasked with "[r]eviewing any and all NFL or club use of Sensor(s) for purposes of collecting any player bio-data and any data and/or information, including player performance and movement, during NFL practices"; "[a]pproving or prohibiting the use of any Sensor in NFL practices after review and/or used

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[197] *See id.* at Art. 51, § 14.

[198] *See* 2011 CBA, *supra* note 7, at Art. 51, § 13.

[199] *See* 2020 CBA, *supra* note 16, at Art. 51, § 14(b) However, a club may only require players to wear any Sensor(s) that has been reviewed and approved by the Joint Sensors Committee in NFL practices. *See id.* at Art. 51, § 14(f).

[200] *See id.* at Art. 51, § 14(b).

[201] *See id.*

[202] *See id.* The Joint Sensors Committee shall consist of three (3) representatives appointed by the NFL Management Council and three (3) representatives appointed by the NFLPA. Unless the parties agree otherwise, members of the Joint Sensors Committee may not have an ownership or other financial interest in any company that produces or sells any Sensor.

to collect bio-data in NFL games"; "[m]onitoring developments in relevant Sensor technology to make recommendations to the NFL and the NFLPA about changes"; and "[e]valuating data outputs from relevant Sensor technology for accuracy and potential for manipulation."[203]

The 2020 CBA also sets forth the disciplinary process if a club or any employee of a club knowingly and materially fails to comply with the rules concerning the approval and use of Sensors in NFL practices. This process includes both the NFL and the NFLPA designating at least one representative to monitor the enforcement of the Sensors subsection and investigate any deviations therefrom.[204] "The NFLPA, the NFL, any club, or any player involved in an alleged failure by a Club or Club employee to comply with the rules regarding the approval and use of Sensors in NFL practices shall each have the right (independently or collectively) to bring forward a complaint about such alleged failure to the NFL and NFLPA designated representatives."[205] The complaint is to be investigated and resolved by the representatives.[206] "If the parties are unable to agree upon whether or not a violation occurred or the appropriate discipline that should be imposed within three weeks following the filing of a complaint, the matter will be immediately referred to the Impartial Arbitrator.[207] The CBA provides for discipline ranging from remedial education to a fine of no more than $150,000 for a first violation, or at least $250,000 plus whatever other measures are deemed to be warranted for a second violation.[208]

The 2020 CBA also addresses ownership of the data collected by Sensors, which is a particularly controversial topic.[209] The 2020 CBA provides that each individual player owns his personal data collected by Sensors, and wearing Sensors shall not require or cause a player to transfer ownership of his data to the club or any other third-party.[210] Players may not, however, use data collected from approved Sensors for any commercial purpose.[211]

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[203] *See id.* at Art. 51, § 14(c).

[204] *See* 2020 CBA, *supra* note 16, at Art. 51, § 14(g).

[205] *See id.* at Art. 51, § 14(g)(i).

[206] *See id.*

[207] *See id.* at Art. 51, § 14(g)(iv); *Id.* at Art. 51, § 14(g)(iv)(a) and (b) set forth the Impartial Arbitrator's procedure for determining any violations of Section 14.

[208] *See* 2020 CBA, *supra* note 16, at Art. 51, § 14(g)(v).

[209] *See* Osborne & Cunningham, *supra* note 185; Gale, *supra* note 185; Studnicka, *supra* note 185.

[210] This grant of rights is subject to the grant of rights set forth in Paragraph 4 of the NFL Player Contract. *See* 2020 CBA, *supra* note 16 Art. 51, § 14(h).

[211] *See id*, at Art. 51, § 14(f) states that commercialization of any current or future data and/or information collected from approved Sensors used in practices is subject to agreement by the parties.

Also, members of the club staff shall have access to data generated by approved Sensors.[212] However, any data collected from Sensors may not be referenced or cited by any club, player or player's representative in contract negotiations.[213] Given that the clubs still have the data from the Sensors, it is unclear how much protection this prohibition provides. Moreover, the NFL and the NFLPA shall also have access to aggregated data collected from such approved Sensor(s).[214] Thus, as with the Sleep Studies, the 2020 CBA creates important rules that permit Sensors to continue to be used, while helping to protect player privacy and autonomy.

Next, the 2020 CBA also creates new rules governing the collection and use of biospecimens, which generally mean blood and urine samples.[215] *Evaluating* discusses such biospecimens as being among the types of medical tests conducted on NFL players or prospective NFL players which may run afoul of ADA or GINA.[216] Like with the usage of Sleep Studies and Sensors, the 2020 CBA does not resolve these legal concerns but does create additional protections for players.

The 2020 CBA requires that the collection of biospecimens must be approved by the NFLPA and, like other types of data collection in the 2020 CBA, subjects that collection to a number of limitations and regulations.[217] First, player participation in any biospecimen collection is strictly voluntary – clubs may not require player participation in a biospecimen collection. Second, each participating player shall own his individual data collected during participation.[218] Third, the data and information collected from a player participating in a biospecimen collection may not be shared with or transferred to the club unless such player provides informed written approval of such transfer.[219] If a player gives such consent, the resulting data will only be shared with the club medical, sports performance, and athletic training staffs.[220] Fourth, information arising from a club biospecimen collection and transferred to the club shall not be used by the club or any third-party for any purpose other than supporting player health and/or performance.[221] Fifth, the clubs intending to conduct a biospecimen collection must

[212] NFL clubs shall comply with all federal and state laws regarding the storage, use and privacy of such data. *See id.* at Article 51, § 14(j).
[213] *See id.* at Art. 51, § 14(h)(i).
[214] *See id.* at Art. 39, § 14(h).
[215] *See id.* at Art. 39, § 14.
[216] *See Evaluating* at Online App. B, p. 11.
[217] *See* 2020 CBA, *supra* note 16, at Art. 39, § 14.
[218] *See id.* at Art. 39, § 14(b).
[219] *See id.* at Art. 39, § 14(c).
[220] *See id.*
[221] *See id.* at Art. 39, § 14(d).

notify the NFL of their intention to do so.[222] While these limitations place restrictions on clubs with regard to biospecimen collections, the new provisions do not affect a club physician's ability to order blood or other biospecimen collection and/or testing of an individual player when he or she determines it is clinically indicated (*e.g.*, to determine if such player is suffering from a medical condition at the player's request or based on the physician's clinical judgment). Otherwise, the purpose of biospecimen collection for NFL players is solely for player health and safety purposes.

D. Behavioral and Mental Health

In multiple works, the Law and Ethics Initiative addressed the importance of providing better mental health awareness and support for NFL players. First, in *Protecting and Promoting*, the authors contributed an entire section to discussing issues of NFL player mental health, including "the fact that medical literature and clinical practice has *associated* psychological symptoms such as anxiety, depression, liability, irritability and aggression in patients with a history of concussions."[223] In addition, chapters in *Protecting and Promoting* concerning financial advisors and family members also addressed the importance of mental health as to those individuals' roles.[224] Consequently, *Protecting and Promoting* included a variety of recommendations addressed to mental health, which will be discussed in more detail below.

Next, the Law and Ethics Initiative published an article in the Journal of Clinical Sport Psychology dedicated to the topic, entitled *Life on an Emotional Rollercoaster: NFL Players and Their Family Members' Perspectives on Player Mental Health* ("*Emotional Rollercoaster*").[225] Importantly, the findings and recommendations contained in *Emotional Rollercoaster*, discussed below as rel-

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[222] *See id.* at Art. 39, § 14(e).

[223] *See Protecting and Promoting*, *supra* note 3, at 68, *quoting In re Nat'l Football League Players' Concussion Injury Litigation*, 307 F.R.D. 351, 401 (E.D. Pa. 2015) (*quoting* Declaration of Dr. Christopher Giza) (emphasis in original); *see also* Zachary Y. Kerr et al., *Nine-Year Risk of Depression Diagnosis Increases with Increasing Self-Reported Concussions in Retired Professional Football Players*, 40 Am. J. Sports Med. 2206 (2012) (finding professional football players self-reporting concussions at greater risk for depressive episodes later in life compared with retired players self-reporting no concussions).

[224] *See Protecting and Promoting*, *supra* note 3, at 329, 331, 350, 352.

[225] *See* Sarah McGraw et al., *Life on an Emotional Rollercoaster: NFL Players and Their Family Members' Perspectives on Player Mental Health*, 12 J. Clinical Sport Psych. 404 (2018) [hereinafter *Emotional Rollercoaster*].

evant, were based on interviews with 25 NFL players (23 former and 2 current) and 27 family members (24 wives and 3 others) of NFL players.[226]

Finally, in an article published in the Journal of Sport Behavior, entitled *NFL or 'Not for Long'? Transitioning out of the NFL* ("*Not for Long*"),[227] the Law and Ethics Initiative analyzed challenges NFL players faced when their careers ended, many of which had a mental health component. This article utilized the same interview data as *Emotional Rollercoaster.*

Fortunately, the 2020 CBA made significant improvements in the area of player mental health. These improvements include: (i) the creation of a Comprehensive Mental Health and Joint Behavioral Health Committee; (ii) the requirement that each club retain a Behavioral Health Specialist, also identified as the "Team Clinician"; (iii) the creation of a Mental Health and Wellness Team at the club level; and (iv) increased confidentiality protections around player mental health issues.

i. Comprehensive Mental Health and Joint Behavioral Health Committee

The Comprehensive Mental Health and Joint Behavioral Health Committee (the "Joint Behavioral Health Committee"), consisting equally of NFL and NFLPA medical representatives, is charged with a variety of duties to promote player mental health.[228] Several of the Joint Behavioral Health Committee's responsibilities closely follow recommendations made by the Law and Ethics Initiative.

First, the Joint Behavioral Health Committee is responsible for developing and scheduling educational programs for players, coaches, and club personnel regarding mental health,[229] including but not limited to "mental health first aid; QPR (Question, Persuade, Refer); ASIST (Applied Suicide Intervention Skills Training); clinical concerns and issues (*i.e.*, depression and/or anxiety); drug and alcohol use and abuse; gambling addiction; violent behaviors' suicide prevention; athlete-specific stressors (*i.e.*, media, identity, social support, injury and navigating sports-specific relationships); and other topics that the Joint Behavioral Health Committee deems relevant for such personnel."[230] This responsibility tracks the second recommendation from *Emotional Rollercoaster*:

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[226] *See id.* at 404.

[227] *See* Sarah McGraw et al., *NFL or 'Not for Long'? Transitioning out of the NFL*, 42 J. Sport Behavior 461 (2019) [hereinafter *Not for Long*].

[228] *See* 2020 CBA, *supra* note 16, at Art. 39, § 19(a).

[229] *See id.* at Art. 39, § 19(a)(i).

[230] *Id.*

> Players (current and former) and their family members should avail themselves of the mental health assistance currently available to them, with assistance from contract advisors (*i.e.*, agents), the NFL, the NFLPA, and others. Relatedly, we recommend that the NFL and NFLPA should continue and improve efforts to educate players about the variety of programs and benefits available to them.[231]

Moreover, *Not for Long* discussed at length one of these issues, that of "identity foreclosure," defined as a "singular focus on athletic skills beginning at a young age, constraining career choices by limiting an athlete's range of life experiences, or the development of other skills and interests."[232]

Second, the Joint Behavioral Health Committee is responsible for

> [d]eveloping sample programming for a mental health/wellness workshop for parents and significant others of players to ensure they are aware of sign and symptoms that may be indicative of mental health concerns, the resources available to players and family members, and to know where to turn should they need support.[233]

These duties resemble multiple recommendations from *Emotional Rollercoaster*. The fifth recommendation from that article advocated that "players and their family members should have access to structured and well-tested programs to help them to anticipate and cope with their mental health challenges as well as gain insight into their personal experiences."[234] Next, the sixth recommendation proposed that "[p]layers and their family members should have confidential access to a variety of professionals trained in counseling or related issues."[235] Finally, the seventh recommendation from *Emotional Rollercoaster* put forth that "[w]ives and family members should be empowered to offer support regarding the mental health challenges that players may face. They should be aware of any gaps in their own understanding of player experiences, and the NFL and NFLPA should offer programs or materials to help them become better health advocates."[236]

Third, the Joint Behavioral Health Committee is tasked with collaborating with local and national mental health organizations to promote stigma reduction related to mental health.[237] In *Emotional Rollercoaster,* the authors discussed how the stigma of mental health treatment prevented

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[231] *Emotional Rollercoaster*, *supra* note 225, at 425.
[232] *Not for Long*, *supra* note 227, at 463.
[233] 2020 CBA, *supra* note 16, at Art. 39, § 19(a)(ii).
[234] *Id.*
[235] *Id.*
[236] *Id.*
[237] *See* 2020 CBA, *supra* note 16, at Art. 39, § 19(a)(iii).

some players from seeking the care they needed.[238] Consequently, the authors stated that "[i]t is important that [mental health] issues be normalized, de-stigmatized, and treated with the appropriate levels of respect and seriousness, as well as confidentiality."[239] Further, the article's first recommendation was that "[p]layers and their families need to hear that they are not alone in their feelings and that mental health challenges are not an abnormal or shameful experience."[240]

Fourth, the Joint Behavioral Health Committee is responsible for developing models of player programs that clubs may use.[241] Among the programs to be addressed by the Joint Behavioral Health Committee are programs to promote "social connectedness and resilience."[242] Part 5 of *Protecting and Promoting* is focused on player advisors, specifically contract advisors (*i.e.*, agents), financial advisors, and family members.[243] As explained therein, these stakeholders are "particularly important in the[ ] broader aspects of health," "including financial wellbeing, education, and social support."[244] Thus, the Joint Behavioral Health Committee's programs concerning social connectedness and resilience would do well to focus on these stakeholders.

Fifth, the Joint Behavioral Health Committee's programs are intended to integrate the player's family ecosystem in the development and provision of mental health resources.[245] As discussed above, both *Emotional Rollercoaster* and *Protecting and Promoting* addressed at length the importance of family involvement in player health matters, stating, for example, that "[f]amilies can play a crucial role in protecting and promoting player health, including by encouraging players to seek proper medical care and appropriately consider long-term interests."[246] Moreover, family can provide crucial "support through challenging times."[247]

Sixth, the CBA declares that the Joint Behavioral Health Committee's programs should include a "model peer development program."[248] Recommendations 1:1-D and 1:1-E from *Protecting and Promoting* propose exactly that. Recommendation 1:1-D declares that "[p]layers should seek out and

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[238] *See Emotional Rollercoaster*, *supra* note 225, at 416, 418, 420.
[239] *Id.* at 422.
[240] *Id.* at 425.
[241] *See* 2020 CBA, *supra* note 16, at Art. 39, § 19(a)(v).
[242] *Id.* at Art. 39, § 19(a)(v)(B).
[243] *See Protecting and Promoting*, *supra* note 3, at 301.
[244] *Id.* at 302.
[245] *See* 2020 CBA, *supra* note 16, at Art. 39, § 19(a)(v)(C).
[246] *Protecting and Promoting*, *supra* note 3, at 347.
[247] *Id.*
[248] 2020 CBA, *supra* note 16, at Art. 39, § 19(a)(v)(D).

learn from more experienced players, including former players, concerning health-related matters."[249] Next, Recommendation 1:1-E asserts that "[p]layers should take on a responsibility to one another, to support one another's health, and to change the culture for the better."[250] This recommendation draws support from a successful "Battle Buddy" program instituted by the United States Army in which soldiers are assigned partners who "help each other through training and then look out for each other physically, emotionally, and mentally when deployed."[251]

Finally, additional work to be done by the Joint Behavioral Health Committee is addressed below in Section III.E: Transitioning out of the NFL.

ii. Behavioral Health Specialist ("Team Clinician")

In addition to the Joint Behavioral Health Committee, the 2020 CBA requires each club to retain a "Behavioral Health Specialist," identified in the CBA as the "Team Clinician."[252] The Team Clinician must be a board-certified psychiatrist, a doctoral-level clinical or counseling psychologist, or a professional counselor with a master's degree in counseling or social work.[253] Moreover, the Team Clinician must have a minimum of seven years of relevant clinical experience working with a multicultural population.[254] Lastly, the Team Clinician is required to have a valid license to practice medicine as required under applicable state law, and any other applicable jurisdiction, that has never been denied, suspended, revoked, terminated, voluntarily relinquished under threat of disciplinary action, or restricted in any way.[255]

The requirement that the Team Clinician have "experience working with a multicultural population" is notable. This is believed to be the first instance in which the CBA acknowledges – even if implicitly – the subject of race. As discussed in *Protecting and Promoting*, the NFL player population is largely Black (about 68%).[256] Moreover, there "is some evidence to suggest that race may be correlated with distrust of the medical profession and medical establishment, although this may be mediated by a variety of fac-

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[249] *Protecting and Promoting*, *supra* note 3, at 79.
[250] *Id.*
[251] *Id.*
[252] *See* 2020 CBA, *supra* note 16, at Art. 39, § 1(b)(v).
[253] *See id.* at Art. 39, § 19(b)(i).
[254] *See id.*
[255] *See id.*
[256] *See Protecting and Promoting*, *supra* note 3, at 60.

tors, including geography and socioeconomic status."[257] Finally, it is important to acknowledge the "social determinants of health."[258]

Importantly, the NFLPA has a say in each club's Team Clinician. After each club has identified a candidate for the position, the NFL and NFLPA shall each designate one person to review and approve the nominee.[259] In considering whether to approve the nominee, the parties shall consider whether the nominee possesses the requisite clinical skills for the position.[260] However, similar to club physicians, athletics trainers, and other consultants, the Team Clinician can be terminated by the club.[261]

The NFLPA's role in selecting the Team Clinician is interesting. As discussed at length in Section III.A.i, both the NFL and NFLPA strongly rejected the Law and Ethics Initiative's recommendation that the structure of club medical staff be changed so that player care and treatment should be provided by one set of medical professionals and evaluation of players for a club's business purposes be done by separate medical personnel. A key component of that recommendation was that the medical staff treating players be appointed by a joint committee with representation from both the NFL and NFLPA. Again, the NFL and NFLPA rejected the recommendation in whole. Yet, now, the parties adopt one of its core features – that the NFLPA play a role in selecting the players' medical providers.

Once retained, the Team Clinician is tasked with a wide-ranging set of duties.[262] The Team Clinician is tasked with "[e]nsur[ing] that all mental health treatment and records created or obtained during the course of providing services to a club's players remain confidential and are maintained, used and disclosed in compliance with applicable laws"; "developing and supervising a comprehensive referral network to provide mental health care for the club's players";[263] "implementing the mental health educational pro-

[257] *Id.*

[258] *See id.* at 329-30.

[259] *See* 2020 CBA, *supra* note 16, at Art. 39, § 19(b)(ii).

[260] *See id.* These skills include: effective player engagement; behavioral health treatment (within his/her areas of expertise); triage and referral for other community-based behavioral health providers and services; consulting effectively with the club Medical Staff and the club Director of Player Engagement; availability for and skill in engaging in modern electronic communication methods as used in professional football; and working effectively with a diverse, multicultural player and staff population, with an awareness and understanding of the culture of football at an elite level.

[261] *See id.*

[262] For a full list of duties, *see id.* at Art. 39, § 19(b)(iii).

[263] This network must include professionals that are qualified to address (if any are beyond the scope of the Team Clinician's expertise): (1) Substance Abuse, (2)

gramming developed by the Joint Behavioral Health Committee"; "[b]e[ing] available on-site to players at least twice weekly during training camp, preseason, regular season, and if applicable, postseason"; "be[ing] available to meet with any player placed on Injured Reserve ("IR") or designated Physically Unable to Perform ("PUP") in order to assess the need for any behavioral health interventions relevant to the player's IR or PUP status"; "[c]ontact[ing] all players transitioning out of the NFL for a voluntary interview and mental health evaluation"; "[p]articipat[ing] in continuing education and case consultation programming created for team clinicians"; and "[p]articipat[ing] in a certain number of conference calls per year and attend[ing] scheduled meetings as set by the Joint Behavioral Health Committee."[264]

The addition of the Team Clinician is responsive to multiple recommendations of the Law and Ethics Initiative. In particular, it responds to the fifth and sixth recommendations from *Emotional Rollercoaster*, which provided as follows: "Players and their family members should have access to structured and well-tested programs to help them to anticipate and cope with their mental health challenges as well as gain insight into their personal experiences"; and "[p]layers and their family members should have confidential access to a variety of professionals trained in counseling or related issues such as chaplains, therapists, and the team's development staff."[265] In addition, some of the other duties of the Team Clinician address other issues raised by the Law and Ethics Initiative, including confidentiality (discussed in Section III.D.iv) and transitioning out of the NFL (discussed in Section III.E).

iii. Mental Health and Wellness Team

The 2020 CBA requires that each club have a mental health and wellness team (the "Mental Health Team").[266] The Mental Health Team is to be led by its Team Clinician.[267] The Mental Health Team "shall also include, at a minimum, the Head Team Primary Care Sports Medicine Physician, Director of Player Engagement, Head Athletic Trainer, Head Strength and Conditioning Coach and Team Chaplain."[268] Further, the Mental Health

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Relationship Counseling, (3) Intimate Partner Violence or Abuse, (4) In-and Out-Patient Psychiatric Treatment, (5) Sport/Performance Psychology.

[264] 2020 CBA, *supra* note 16, at Art. 39, § 19(b)(iii)(A)-(I).

[265] *Emotional Rollercoaster*, *supra* note 225, at 425.

[266] *See* 2020 CBA, *supra* note 16, at Art. 39, § 19(i).

[267] *See id.*

[268] *Id.*

Team is required to meet at least once a month "during the season and quarterly during the offseason to discuss ongoing mental health education and identify potential issues or concerns."[269] The Team Clinician is tasked with facilitating these meetings and providing education while at the same time maintaining the privacy and confidentiality of the player-patients.[270] Finally, the content of these meetings must "remain strictly confidential."[271]

The creation of the Mental Health Team tracks many of the recommendations from *Emotional Rollercoaster*, as discussed above. Moreover, the Mental Health Team addresses the role of two individuals highlighted in the work of the Law and Ethics Initiative.

First, the Mental Health Team includes a club's Director of Player Engagement. Player Engagement staff are lesser-known club personnel who, as described in *Protecting and Promoting*, "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."[272] Further, *Protecting and Promoting* declared that "[a]s 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."[273] Nevertheless, those who hold these positions are often not provided the resources or support to be successful in their roles.[274] Consequently, Recommendation 10:1-B of *Protecting and Promoting* recommended that "[c]lubs should adequately support the developmental staff."[275] The 2020 CBA's inclusion of the Director of Player Engagement within the Mental Health Team seemingly responds to these concerns and identifies this role as an important one moving forward.

Second, the Mental Health Team includes the Team Chaplain. As described in *Protecting and Promoting*,

> [e]very club generally has a chaplain who will visit practice once or twice during the week and be present before games. The chaplains often hold small studies or sermons but avoid overly religious messaging, instead fo-

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[269] *Id.*
[270] *Id.*
[271] *Id.*
[272] *Protecting and Promoting*, *supra* note 3, at 286.
[273] *Id.*
[274] *See id.*
[275] *Id.* at 291.

> cusing on themes relevant to football and the players or other themes as directed by the coaching staff.[276]

Both *Protecting and Promoting* and *Emotional Rollercoaster* discussed Team Chaplains as important sources of support for many players.[277] For this reason, the Law and Ethics Initiative recommended that Team Chaplains be among the "professionals trained in counseling" and made available to players for mental health support.[278] The 2020 CBA effectively adopts this recommendation.

iv. Confidentiality

Successful mental health treatment requires confidentiality between the provider and the patient.[279] Unfortunately, players historically have had serious concerns that discussing mental health issues with club medical staff or personnel has not been kept confidential.[280] As a result, many players avoid seeking out mental health treatment.[281]

The players' concerns were well-founded. *Protecting and Promoting* includes copies of collectively bargained waivers that all players sign.[282] These waivers permit "the player's medical information to be disclosed to and used by a wide variety of parties, including but not limited to the NFL, any NFL club, and any club's medical staff and personnel, such as coaches and the general manager."[283] "Players sign these waivers without much (if any) hesitation out of fear that behaving otherwise could cost them their jobs."[284] The first of two waivers authorizes the club, the NFL, and other parties to use and disclose the player's "entire health or medical record," expressly including "all records and [protected health information] relating to any mental health treatment, therapy, and/or counseling, but expressly excluding psychotherapy notes."[285] The second waiver authorizes all of the players' "healthcare providers," including "mental health providers" to disclose

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[276] *Id.* at 69.

[277] *See id.*; *Emotional Rollercoaster*, *supra* note 225, at 417.

[278] *See Emotional Rollercoaster*, *supra* note 225, at 426.

[279] *Protecting Your Privacy: Understanding Confidentiality*, AM. PSYCHOL. ASS'N (Oct. 19, 2019), https://www.apa.org/topics/ethics-confidentiality [https://perma.cc/BM3J-X2MP].

[280] *See Emotional Rollercoaster*, *supra* note 225, at 416, 418-19, 420-21.

[281] *See id.*

[282] *See Protecting and Promoting*, *supra* note 3, at Apps. L, M.

[283] *Protecting and Promoting*, *supra* note 3, at 102.

[284] *Id.*

[285] *Id.* at 138.

player health information and records to the NFL, NFL clubs, and other parties.[286]

The Law and Ethics Initiative considered these waivers to be one of the most significant issues concerning player health.[287] Consequently, in both *Protecting and Promoting* and *Emotional Rollercoaster*, the Initiative recommended that "[t]he NFL and NFLPA should reconsider whether waivers providing for the use and disclosure of player medical information should continue to include mental health information."[288]

Unfortunately, the 2020 CBA leaves these waivers unchanged.[289] The continued existence of these problematic waivers is confusing in light of numerous other changes the 2020 CBA makes that positively address confidentiality issues.

First, the Team Clinician must "[e]nsure that all mental health treatment and records created or obtained during the course of providing services to a club's players (including any voluntary mental health evaluations) (collectively 'Mental Health Records') remain confidential and are maintained, used and disclosed in compliance with applicable laws."[290] Further, the 2020 CBA declares that

> all Mental Health Records, with the exception of diagnosis and prescription drug information related to the mental health services provided by the Team Clinician, shall be maintained by the individual Team Clinician in a record separate from the NFL EMR [electronic medical record], which shall be afforded all protections that the clinician's other patient records enjoy.[291]

Second, any Mental Health Records that the Team Clinician creates when providing mental health services shall be considered protected health information ("PHI") and subject to Health Insurance Portability and Accountability Act ("HIPAA").[292] The Team Clinician may only disclose such PHI as permitted by HIPAA.[293] The 2020 CBA further declares that "[f]or the avoidance of doubt, the Team Clinician may NOT share *any details* regarding treatment provided to a player with any member of the club, other than with the Head Team Primary Care Sports Medicine Physician when

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[286] *See id.*
[287] *See id.* (describing the waivers as "troubling").
[288] *Id.*; *Emotional Rollercoaster*, *supra* note 225, at 422.
[289] *See* 2020 CBA, *supra* note 16, at App. S.
[290] *Id.* at Art. 39, § 19(b)(iii)(A).
[291] *Id.* at Art. 39, § 19(f).
[292] *See id.* at Art. 39, § 19(c).
[293] *See id.*

medically necessary to provide treatment to the Player."[294] This express declaration nonetheless conflicts with the waivers players sign which relinquish their rights to confidentiality under HIPAA.[295]

Third, each year, the Team Clinician must sign an annual certification and submit it to the NFL Chief Medical Officer and the NFLPA Medical Director that (i) details any and all "Breaches" as defined under HIPAA in the prior year; (ii) confirms that he/she meets all state requirements to provide mental health services, including any licenses and certifications; (iii) confirms that his/her licenses have never been denied, suspended, revoked, terminated or voluntarily relinquished under threat of disciplinary action or restricted in any way; and (iv) assures that he/she has complied with all laws regarding the corporate practice of medicine, health care fraud and abuse laws, and laws regarding the privacy and security of patient information including but not limited to the ADA, HIPAA, and any applicable state laws.[296]

Fourth, the Team Clinician must be allotted space conducive to privacy and confidentiality in the club's facility for direct service provision and consultation to players and the space and resources necessary to maintain the confidentiality of any and all electronic and paper Mental Health Records in a manner that complies with applicable laws, including but not limited to HIPAA and the ADA.[297]

Fifth, and perhaps most importantly, the 2020 CBA sets forth a comprehensive process to address any breaches of confidentiality. The 2020 CBA states that:

> Should there be an unauthorized disclosure of a player's Mental Health Records, the Team Clinician shall notify the Head Team Physician and club President as well as the NFL Chief Medical Officer and NFLPA Medical Director. To the extent that the unauthorized disclosure constitutes a 'Breach' as defined by HIPAA, the Team Clinician and/or club shall comply with any breach notification requirements outlined in HIPAA at 45 CFR §§ 164.404. If there has been unauthorized access to Mental Health Records stored in the segregated part of the EMR, the Parties will cooperate in investigating such unauthorized access and provide appropriate remedial measures. Any intentional and/or knowing unauthorized access to or dissemination of Mental Health Records (*e.g.*, clinical diagnosis and/or

[294] *Id.* at Art. 39, § 19(c)(i) (emphasis in original).

[295] *See id.* at App. S.

[296] *See id.* at Art. 39, § 19(a)(i)-(v). The ADA confidentiality requirements are discussed in *Evaluating*, *supra* note 186, at 260-62.

[297] *See* 2020 CBA, *supra* note 16, at Art. 39, § 19(a)(iii)(E).

> prescription(s)) will be considered a material violation of this Agreement and subject to the discipline procedures set forth below.[298]

If the NFL and NFLPA's investigation determines that a Team Clinician improperly disclosed a player's Mental Health Records, "**that Clinician shall be subject to termination**."[299] Moreover, the Commissioner "shall impose discipline against the club in the form of a fine of no less than five hundred thousand dollars ($500,000) and such other measures as the Commissioner deems necessary as a deterrent for future violations (*e.g.*, loss of Draft Picks)."[300] Importantly, the $500,000 fine is not discretionary – the provision makes clear that the Commissioner "shall impose" such discipline.

As would be expected, the NFL and NFLPA might have different opinions about the result of such an investigation. Consequently, "[i]f the Parties are unable to agree upon whether or not a Breach or violation of [the 2020 CBA] has occurred, then either Party may immediately refer the matter to the Impartial Arbitrator."[301] As stated earlier, the Impartial Arbitrator is an arbitrator appointed by the NFL and NFLPA with jurisdiction over a broad range of disputes that might arise out of the CBA.[302] If the "Impartial Arbitrator finds that a club, or an individual acting under its control, willfully violated the provisions of this Agreement or willfully committed a Breach of its confidentiality obligations pursuant to HIPAA," then the Commissioner must impose the discipline described above.[303]

This newfound disciplinary scheme finds support in several recommendations from the Law and Ethics Initiative. Notably, in each chapter of *Protecting and Promoting*, the authors examined the mechanisms available to players to enforce the various legal and ethical obligations of stakeholders in player health.[304] Having found those mechanisms deficient,[305] Recommendation 7:2-A recommended that "[t]he CBA should be amended to provide for meaningful fines for any club or person found to have violated" Article

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[298] *Id.* at Art. 39, § 19(c)(ii).

[299] *Id.* (emphasis in original).

[300] *Id.* at Art. 39, § 19(c)(iii).

[301] The Impartial Arbitrator is described in Article 16 of the 2020 CBA and is discussed *infra* with regard to his or her role in player health and safety disciplinary measures.

[302] *See* 2020 CBA, *supra* note 16, at Art. 16.

[303] *See id.* at Art. 39, § 19(c)(iii).

[304] *See Protecting and Promoting*, *supra* note 3, at 33.

[305] *See id.* at 244 ("[Q]uestions have been raised by some stakeholders we interviewed about the NFLPA's ability to investigate and enforce player health provisions through grievances.").

39 of the CBA, governing player medical care and treatment.[306] Further, Recommendation 7:5-A recommended that "[t]he NFLPA should consider investing greater resources in investigating and enforcing player health issues, including Article 39 of the 2011 CBA."[307] As it concerns player mental health information, the 2020 CBA substantially adopts these recommendations.

Nevertheless, this Section must close by again pointing out the inconsistency between these extensive protections of player mental health records and the expansive waivers that players sign. Ideally, the provisions of the CBA will control in practice and in policy over the waivers – meaning player mental health records will be kept confidential.

E. Transitioning out of the NFL

As explained in *Not for Long*, NFL "players typically have a short playing career, often leaving the league due to injury or lack of interest from teams before they have been able to prepare sufficiently for life after the league."[308] Moreover, in transitioning out of the NFL, players face "challenges arising from the nature and structure of the NFL as a work environment, their special status as NFL players, the effects of identity foreclosure, limited exposure to work outside of the NFL, difficulties with financial planning, and, for some, limited educational and social skills."[309]

Through interviewing current and former players and their family members, *Not for Long* sought to analyze these exact issues and make recommendations for change. The article's recommendations are to: (1) "support the early and on-going preparation for career change, including supporting opportunities to identify new interests, encouraging players to think about their transferable skills, and help them with psychological preparations to anticipate their change in social status when they might find themselves at the bottom of the occupational ladder and may no longer receive preferential treatment";[310] (2) "help players to strengthen personal skills by recognizing that some players might benefit from learning how to manage new daily routines, conduct job searches, network, and enhance the interpersonal and communication skills necessary to work environments outside of football";[311] (3) "promote exposure to other professions by recognizing that

[306] *See id.* at 238.
[307] *Id.* at 244-45.
[308] *Not for Long*, *supra* note 227, at 461.
[309] *Id.* at 482.
[310] *Id.* at 484.
[311] *Id.*

without work experience outside of football, some players have unrealistic expectations about salaries in other professions and do not develop strong job search skills";[312] (4) "develop programs for wives and other family members to help to support NFL players in preparing for a career change";[313] and (5) "develop programs to assist players with financial planning and management."[314]

Fortunately, the 2020 CBA makes two changes to address these important issues. First, as discussed earlier, the Joint Behavioral Health Committee is tasked with a variety of duties intended to improve the health and welfare of NFL players. On this specific issue, the Committee is responsible for developing a program "[a]ddressing the stresses and needs of Players transitioning out of NFL."[315] The Committee would be wise to read *Not for Long* to better understand these issues.

Second, the Team Clinician, discussed at length above, is responsible for "[c]ontact[ing] all Players transitioning out of the NFL for a **voluntary** interview and mental health evaluation. During this interview, the Team Clinician shall explain to the Player all mental health and career transitioning programs available via the NFL and NFLPA."[316] This obligation is responsive to Recommendation 7:3-A from *Protecting and Promoting*, which recommended that "[t]he NFL and NFLPA should continue and improve efforts to educate players about the variety of programs and benefits available to them."[317] As explained in that report, "the NFL and NFLPA offer many benefits and programs to current and former players to help them on a wide spectrum of issues, including most importantly healthcare and career-related guidance. However, it appears that many players are not taking full advantage of these programs."[318] The Team Clinician's work as part of the 2020 CBA should help remedy that problem.

Collectively, these two new CBA provisions will create programs to help players transition out of the NFL and make sure players take advantage of those programs. These changes were the goal of *Not for Long*.

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[312] *Id.* at 484-85.
[313] *Id.* at 485.
[314] *Id.*
[315] 2020 CBA, *supra* note 16, at Art. 39, § 19(a)(v)(A).
[316] *Id.* at Art. 39, § 19(b)(iii)(G) (emphasis in original).
[317] *Protecting and Promoting*, *supra* note 3, at 239.
[318] *Protecting and Promoting*, *supra* note 3, at 240.

F. *Club Personnel: Athletic Trainers, Strength and Conditioning Coaches, and Equipment Managers*

Athletic trainers, strength and conditioning coaches, and equipment managers are all important stakeholders in the health and safety of NFL players. For these reasons, *Protecting and Promoting* devoted chapters or specific sections to each of these club employees.[319]

The 2020 CBA makes changes addressing each of these positions and which track recommendations made by Law and Ethics Initiative work.

First, in *Protecting and Promoting*, the Law and Ethics Initiative pointed out that the 2011 CBA's requirement that athletic trainers be certified by the National Athletic Trainers Association ("NATA") was actually in error and a requirement with which athletic trainers were not able to comply.[320] NATA is a voluntary professional association but does not *certify* athletic trainers.[321] Athletic trainers are certified by the Board of Certification for the Athletic Trainer ("BOC").[322] The BOC used to be part of NATA but split from the voluntary association in 1989.[323] The 2020 CBA corrects this error by requiring athletic trainers to be certified by the BOC, while also adding the requirement of a Master's Degree and a current certification in Basic Cardiac Life Support or Basic Trauma Life Support.[324]

Second, *Protecting and Promoting* noted that the 2011 CBA contained "no references to or requirements for strength and conditioning coaches" even though they "play an important role in a player's career."[325] As explained in the report, "strength and conditioning coaches are responsible for overseeing a player's general fitness and physical preparedness for NFL games. 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."[326] Moreover, "[g]iven 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."[327] While "NFL strength

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[319] *See Protecting and Promoting*, *supra* note 3, at Ch. 3 (Athletic Trainers), Ch. 11 (Equipment Managers), 273 (discussing strength and conditioning coaches).

[320] *See Protecting and Promoting*, *supra* note 3, at 162.

[321] *See id.*

[322] *See id.*

[323] *See id.*

[324] *See* 2020 CBA, *supra* note 16, at Art. 39, § 2.

[325] *Protecting and Promoting*, *supra* note 3, at 273.

[326] *Id.*

[327] *Id.*

and conditioning coaches have typically had a college degree in exercise science or a similar discipline and certification from the National Strength and Conditioning Association," there was no such requirement in the CBA.[328]

The 2020 CBA remedies this deficiency. The 2020 CBA requires that by the opening of preseason training camp for the 2021 season, each club must have secured "the services of at least one strength and conditioning coach on a full-time basis to serve as the Head Strength and Conditioning Coach."[329] Further, the 2020 CBA requires that "[e]ach individual hired for the first time to perform services as a Head Strength and Conditioning Coach for a club must, as of the hiring date, have a Master's Degree in an accredited exercise science, health science, or physical education-related discipline; a certification from the National Strength and Conditioning Association ('NSCA') (or a similar organization as the parties may agree) as a Certified Strength and Conditioning Specialist ("CSCS"); at least five (5) years of experience as a strength and conditioning coach since he/she first received the foregoing certification; and demonstrated experience working with elite athlete populations."[330] These certification requirements will help ensure that players are working with appropriately and highly qualified strength and conditioning coaches.

Third, *Protecting and Promoting* discussed the role of Equipment Managers, who, among other duties, "help players select equipment and make sure the equipment fits according to the manufacturer's guidelines."[331] In this respect, "players rely on the equipment managers to help prepare and protect them."[332] The report further explained the role of the American Equipment Managers Association ("AEMA"), a voluntary organization which "provides certification to equipment managers working in sports across the country."[333] Recommendation 11:1-A of *Protecting and Promoting* recommended that "[t]he CBA should require that all equipment managers be certified by the AEMA."[334]

The 2020 CBA adopts this recommendation. The 2020 CBA requires that by the opening of preseason training camp for the 2021 season, each club shall have "at least one (1) equipment manager to serve as the Head Equipment Manager on a full-time basis."[335] Further, "[e]ach individual

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[328] *See id.*
[329] 2020 CBA, *supra* note 16, at Art. 51, § 17.
[330] *Id.*
[331] *Protecting and Promoting*, *supra* note 3, at 294.
[332] *Id.*
[333] *Id.*
[334] *Protecting and Promoting*, *supra* note 3, at 298.
[335] 2020 CBA, *supra* note 16, at Art. 51, § 18.

hired for the first time to perform services as a Head Equipment Manager for a club must, as of the hiring date: (a) be certified by the Athletic Equipment Managers Association (or a similar organization as the parties may agree); and (b) have experience working with elite athlete populations (*i.e.*, Division I Collegiate, Olympic, profession level athletes)."[336] As stated in *Protecting and Promoting*, "[r]equiring 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."[337]

G. Miscellaneous

In addition to the comprehensive set of issues discussed above, the 2020 CBA contains a variety of other changes with connections to work from the Law and Ethics Initiative. These miscellaneous changes concern the following issues: (i) player access to medical records; (ii) financial advisors; (iii) research protocols; (iv) prohibited drills; (v) squad size; (vi) former player benefits; and (vii) guaranteed compensation.

i. Player Access to Medical Records

As discussed in *Protecting and Promoting,*

> [r]esearch has. . . shown that patients who have access to their medical records feel more in control of their healthcare and better understand their medical issues.[338]

Consequently, Recommendation 1:1-I, directed at players, recommends that they "should review their medical records regularly."[339] While players can access their electronic medical records ("EMR") through an online portal,[340] it is not clear how often they do.

The 2020 CBA makes changes which should assist in players being more knowledgeable about their medical records. The 2020 CBA requires that within 30 days of a club's last game, the club must "provide a summary listing taken from the player's Electronic Medical Record ('EMR') of every

[336] *Id.* Additionally, all Equipment Managers, regardless of dates of hiring, shall complete annual Continuing Education Units (CEUs) on jointly agreed-upon, relevant topics.

[337] *Id.*

[338] *Protecting and Promoting*, *supra* note 3, at 81.

[339] *Id.*

[340] *See Protecting and Promoting*, *supra* note 3, at 161-62.

club physician-diagnosed medical condition evaluated and treated by any club physician during the immediately preceding season and any club physician-prescribed medications given during the immediately preceding season (the 'Summary Report')."[341] Further, the Summary Report must "be provided, in written and electronic formats to the player's home and e-mail addresses contained within the EMR."[342] Clubs must provide Summary Reports "for all players who were on its roster at any time during that season."[343]

The obligatory Summary Report is an important step in transparency. As explained in *Protecting and Promoting*,

> [r]eviewing the records will ensure that the club's medical staff is properly documenting the player's condition and concerns while also helping the player to ensure he is following the proper treatment for the condition . . . . Additionally, in reviewing his medical records and knowing that the club will also review them, a player might become more aware of how his medical conditions or history could adversely affect his employment. For example, the medical records might include a note from the athletic trainer that a player's knee condition prevents him from cutting and running as he had in the past, leading the club to terminate his contract.[344]

ii. Financial Advisors

Financial advisors are a critical stakeholder in players' long-term health.[345] As explained in *Protecting and Promoting*, "[f]inancial health is a major contributor to physical and mental health, and also, in turn, affected by physical and mental health. Indeed, many studies have shown a correlation between financial debt and poor physical health." Unfortunately, "there are many stories of NFL players suffering from financial difficulties."[346]

For these reasons, since 2002, the NFLPA has maintained a program that registers financial advisors according to its Regulations and Code of

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[341] 2020 CBA, *supra* note 16, at Art. 40, § 3.
[342] *Id.*
[343] *Id.*
[344] *Protecting and Promoting*, *supra* note 3, at 81. In reviewing a draft of Protecting and Promoting Report, the NFL admitted as much, stating that clubs examine a player's medical records to "evaluate whether or not a player is healthy enough to practice and play." Of course, this has implications for the player's employment status.
[345] *Protecting and Promoting*, *supra* note 3, at 329.
[346] *Id.* at 330-32.

Conduct Governing Registered Player Financial Advisors ("Financial Advisor Regulations")."[347] The Financial Advisor Regulations "contain extensive eligibility requirements, including: a bachelor's degree; a minimum of eight years of experience with appropriate financial industry licensure; minimum of $4 million in insurance coverage; and, no civil, criminal or regulatory history relevant to financial services or fiduciary duties."[348] "The NFLPA's financial advisor program was, and remains, the only one of its kind among the major American sports unions, and deserves praise in this regard."[349]

Nevertheless, the NFLPA's control over financial advisors is limited – there is no legal framework that requires financial advisors to register with the NFLPA and players are not obligated to use registered financial advisors.[350] This is a problem. As described in *Protecting and Promoting*, "[t]here is significant concern and evidence that players are not well-served by the financial advisor industry and otherwise are prone to mishandling their finances."[351] For this reason, *Protecting and Promoting* made numerous recommendations toward improving the financial advisor industry, including that: "[p]layers should be encouraged by the NFL, NFLPA, and contract advisors to work exclusively with NFLPA-registered financial advisors" (Recommendation 13:1-A);[352] "[p]layers should be given information to ensure that they choose financial advisors based on their professional qualifications and experience and not the financial benefits the financial advisor has or is willing to provide to the player" (Recommendation 13:1-D);[353] and "[t]he NFLPA and NFL should consider holding regular courses on financial issues for players" (Recommendation 13:2-A).[354]

The 2020 CBA reiterates an aspirational provision also contained in the 2011 CBA: "[t]he parties will continue their programs to provide information to current and former players concerning financial advisors and financial advisory firms and shall jointly (at the Annual Rookie Symposia and otherwise) and separately develop new methods to educate such players concerning the risks of various investment strategies and products, as well as the provision of any background investigation services."[355]

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[347] *Id.* at 332.
[348] *Id.*
[349] *Id.*
[350] *See id.* at 331-32.
[351] *Id.* at 340.
[352] *Id.*
[353] *Id.* at 342.
[354] *Id.* at 343.
[355] 2020 CBA, *supra* note 16, at Art. 51, § 12.

At first glance, reiterating this vague provision is not progress. However, the 2020 CBA now directs that each club's Director of Player Engagement is responsible for "coordinating and participating in the administration" of these financial programs and "identify[ing] and develop[ing] educational programming that is relevant to his or her own Club's players."[356] As discussed earlier, Directors of Player Engagement have been historically under-utilized resources in advancing player health and wellness matters.[357] The 2020 CBA's explicit recognition and empowerment of this position could have a meaningful and positive impact on players' lives.

iii. Research Protocols

As mentioned in Part I, outside of FPHS, Deubert authored an article in the Penn State Law Review entitled *The Combine and the Common Rule: Future NFL Players as Unknowing Research Participants*.[358] This article examined the application of federal regulations governing human subjects research, known as the "Common Rule," to studies being conducted with the medical information of prospective NFL players gathered at the NFL Combine.[359] The Common Rule typically requires that research be reviewed and approved by an Institutional Review Board ("IRB") and that the researchers obtain the participants' informed consent before proceeding.[360] The purpose of the Common Rule is to ensure that research on human subjects is conducted ethically and transparently.[361]

To be clear, the article concerned studies conducted on *prospective* – not current – NFL players. In total, Deubert found and examined 42 studies that have been published using medical data gathered at the NFL Combine.[362] The article ultimately found that "it is highly questionable whether informed consent—as required by the spirit and letter of the Common Rule—is being obtained" for these studies.[363] Consequently, the article makes multiple recommendations

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[356] *Id.* at Art. 51, § 19.
[357] *See infra* Section D.iii.
[358] Christopher R. Deubert, *The Combine and the Common Rule: Future NFL Players as Unknowing Research Participants*, 123 Penn St. L. Rev. 303 (2019).
[359] *See id.* at 304.
[360] *See id.*
[361] *See id.* at 308-12 (providing historical background on the Common Rule).
[362] *See id.* at 327.
[363] *Id.* at 304.

> for better protecting NFL Combine participants in the context of human subjects research: (1) requiring researchers and/or the Combine participants to read the consent form aloud and audio record the process; (2) requiring all research to be approved by the National Football League Players Association; (3) requiring consent forms to be provided to the Combine participants' agents; (4) having IRBs engage the perspective of a player when evaluating research; and (5) requiring that Combine participants' decision whether or not to participate in the research remain confidential.[364]

The 2020 CBA does nothing to address the specific problems raised in *The Combine and the Common Rule*. However, it did, for the first time ever in a CBA, set forth guidelines for research involving NFL players. More specifically, the new rules govern "the protection, extraction and analysis of certain player health information from the NFL Electronic Medical Record System database and its subsequent use and dissemination in furtherance of various player health and safety initiatives."[365]

The 2020 CBA firsts set forth new rules governing research done by IQVIA (formerly known as Quintiles).[366] "As part of the League's Injury Surveillance System, IQVIA collects and analyzes relevant data from the EMR regarding the occurrence of injuries and illnesses that may impact a player's ability to practice and play."[367]

> IQVIA subsequently produces injury/illness reports, which encompass all reportable injuries and broadly describe analyses of injury occurrence, time trends, rates, examinations based on setting, player position, contact level, team activity, player activity, impact source and other factors potentially related to injuries, such as turn type, timing within the season, and severity of injury.[368]

These reports are provided to both the NFL and NFLPA.[369]

Further, the 2020 CBA provides that

> The Parties agree that the purpose and intent of these activities is to assess, improve, and advance player health, safety, care, treatment and outcomes throughout the NFL and in the operation of the Clubs. This is done through the work of IQVIA and various committees, subcommittees, panels, boards, and others that advise the NFL, the Clubs, the players, and

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[364] *Id.* at 304.

[365] 2020 CBA, *supra* note 16, at Art. 39, § 18.

[366] *See id.* For more on Quintiles, *see Protecting and Promoting*, *supra* note 3, at 62-68.

[367] *Id.* at Art. 39, § 18(a).

[368] *Id.*

[369] *See id.* at Art. 39, § 18(b).

> the NFLPA on health and safety-related issues, policies, research and programs. These assessment and improvement efforts are also intended to yield education and technological opportunities and improvements for the NFL, the Clubs, and the players.[370]

Next, the 2020 CBA makes clear that IQVIA's data collection and reporting shall "not be used for treatment purposes and IQVIA does not and will not have the ability to modify a player's record in any manner."[371] Nevertheless, the parties seemingly disagree as to whether HIPAA applies to the data being analyzed by IQVIA, with the parties "reserv[ing] their respective positions" on this issue and instead agreeing "to adopt certain processes for using and disseminating this data in a manner that is intended to ensure its privacy and safeguarding."[372] In particular, such reports will either redact player names or de-identify the player data.[373]

Aside from research conducted by IQVIA, Appendix X contains eight pages which set "forth the protocols to obtain the requisite approval for the dissemination and use of NFL player injury data and related information for research."[374] The protocols vary depending on the nature of the research request, which will fit into one of the following categories: active/interventional player research; NFL club physician EMR data requests for internal/club use only; NFL medical committee member data requests for internal committee use only (de-identified data); NFL medical committee member data requests for internal committee use only (identified or identifiable data); NFL club physician/NFL medical committee member data requests for EMR data research in which publication or public disclosure is intended (de-Identified, identifiable, and identified data); NFL club physician/NFL medical committee member data requests for EMR data research in which publication or public disclosure is intended (case study); and research by third-parties without NFL affiliation.[375]

Generally, each of the aforementioned requests will be reviewed by the NFL, NFLPA, their respective medical advisors, and any relevant medical committee. Most importantly, Appendix X requires that many of these research requests be approved by an IRB.[376] In this respect, the 2020 CBA responds to the concerns raised in *The Combine and the Common Rule*. As that article stated, "IRBs have the potential to ensure that NFL Combine partici-

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[370] *Id.* at Art. 39, § 18(a).
[371] *Id.*
[372] *Id.*
[373] *See id.* at Art. 39, § 18(b).
[374] *Id.* at App. X.
[375] *See id.*
[376] *See id.*

pants [or current players] are being subjected to research in the dignified and respectful matter required by the Common Rule."[377]

iv. Prohibited Drills

Chapter 9 of *Protecting and Promoting* analyzes the role of NFL coaches in player health.[378] That Chapter briefly described the importance of NFL coaches to a player's career:

> NFL coaches work incredible hours and face unrelenting criticism and pressure to succeed. 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. 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. Moreover, some head coaches are the final decision-makers on player personnel decisions.[379]

Of course, one of the principal responsibilities of an NFL coaching staff is determining the drills to be conducted during practice. In this respect, coaches can play an important role in determining players' exposure to harmful or dangerous physical contact, some of which is of course inherent in the nature of football. In recent years, there have been multiple examples of both college and NFL coaches utilizing new instructional methods to limit contact between players.[380] Most notably, the use of motorized tackling dummies has become common.[381]

For these reasons, Recommendation 9:1-C of *Protecting and Promoting* recommends that coaches "consider innovative ideas and methods that might improve player health."[382] The 2020 CBA responds to this recommendation by prohibiting certain drills, which will necessarily force coaches' instructional methods to evolve. Specifically, the following drills are now prohibited: Bull in the Ring/King of the Circle, Oklahoma Drill, OL/DL In-Line Run Blocking/Board-Drill, Half Line/Pods/3-Spot, and drills that in-

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[377] Christopher R. Deubert, *The Combine and the Common Rule: Future NFL Players as Unknowing Research Participants*, 123 PENN ST. L. REV. 303, 305 (2019).

[378] *See Protecting and Promoting*, *supra* note 3, at Ch. 9.

[379] *Protecting and Promoting*, *supra* note 3, at 272.

[380] *See Protecting and Promoting*, *supra* note 3, at 282.

[381] *See id* at 67.

[382] *Id.*

clude the essential elements of these drills as defined by the CBA.[383] The prohibition of these drills will almost certainly lead to lower injury rates, particularly during training camp when injury rates are higher.[384]

v. Squad Size

The 2011 CBA provided that the number of active players on a game day was limited to 46 players.[385] With a full roster of 53 players, this means that seven players are designated as inactive for each game.[386] The seven inactive players typically include players with injuries that last one or a few weeks in duration. In *Protecting and Promoting*, the Law and Ethics Initiative argued in Recommendation 7:1-E that concussions required a unique approach: exempting players diagnosed with a concussion from the club's 53-man roster:

> According to the leading experts, 80 to 90 percent of concussions are resolved within 7 to 10 days. Thus, concussion symptoms persist for longer than 10 days for approximately 10 to 20 percent of athletes. In addition, a variety of factors can modify the concussion recovery period, such as the loss of consciousness, past concussion history, medications, and the player's style of play. Consequently, a player's recovery time from a concussion can easily range from no games to several. The uncertain recovery times create pressure on the player, club, and club doctor. Each roster spot is valuable and clubs constantly add and drop players to ensure they have the roster that gives them the greatest chance to win each game day. As a result of the uncertain recovery times, clubs might debate whether they need to replace the player for that week or longer. The club doctor and player might also then feel pressure for the player to return to play as soon as possible. By exempting a concussed player from the 53-man roster, the club has the opportunity to sign a short-term replacement player in the event the concussed player is unable to play. At the same time, the player and club doctor would have some of the return-to-play pressure removed.[387]

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[383] *See* 2020 CBA, *supra* note 16, at Art. 23, § 7(f).

[384] *See* Christopher Deubert et al., *Comparing Health-Related Policies and Practices in Sports: The NFL and Other Professional Leagues*, 77-78 (2017), available at 8 HARV. J. SPORTS & ENT. L. 1 (May 2017, Special Issue).

[385] *See Protecting and Promoting*, *supra* note 3, at 234.

[386] *See id.*

[387] *Id.*

Indeed, prior to the 2017 season, the Washington Football Team proposed this exact recommendation.[388] While the proposal was not adopted at that time, it potentially influenced the new roster rules in the 2020 CBA.

The 2020 CBA increased a club's active/inactive roster size from 53 players to 54 or 55 players if a club signs a player or players from its practice squad.[389] Practice squads are nine-man collections of players striving to make the club's active roster and who often do as players are injured during the season.[390] With the changes under the 2020 CBA, practice squad players can be elevated to the club's roster without affecting the status of a player recently diagnosed with a concussion. In this respect, practice squad players can serve as short-term replacements until the concussed player has fully recovered. This change thus substantially meets the purposes of Recommendation 7:1-E.[391]

vi. Former Player Benefits

As discussed in the Introduction and Section II of this Article, the health concerns of former players have been an important driver of change. Nevertheless, as discussed in *Protecting and Promoting*, the NFLPA's ability to assist, or negotiate on behalf of, former players is limited.[392] Pursuant to the National Labor Relations Act, the federal law governing the NFLPA's activities as a union, the NFLPA only owes duties to current players – not former players.[393] "This legal reality creates tension between the NFLPA and former players" as each dollar negotiated on behalf of former players is a dollar that is not available to current players.[394] For these reasons, Recommendation 7:6-A of *Protecting and Promoting* recommended that "[t]he NFLPA should continue to assist former players to the extent such assistance is consistent with the NFLPA's obligations to current players."[395]

Fortunately, the 2020 CBA reflects the NFLPA's continued efforts to help former players. The 2020 CBA increases the amounts available to for-

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[388] *See* Tom Pelissero, *Roster Exemptions for Players with Concussions Could Draw Vote from NFL Owners*, USA TODAY (May 22, 2017), https://www.usatoday.com/story/sports/nfl/2017/05/22/roster-exemption-concussion-proposal-vote-owners-spring-meeting/102030906/ [https://perma.cc/6KGN-PFGF].

[389] *See* 2020 CBA, *supra* note 16, at Art. 25, § 4.

[390] *See Protecting and Promoting*, *supra* note 3, at 60.

[391] *See id.* at 234.

[392] *See id.* at 223-24.

[393] *See id.*

[394] *See id.* at 244.

[395] *Id.*

mer players under a wide range of benefit programs.[396] Next, perhaps the most significant change was the reduction of the vesting requirement for the NFL pension plan from four credited seasons to three credited seasons.[397] This change will enable about 700 former NFL players to receive pension benefits for which they were previously ineligible.[398] Furthermore, the new CBA included the implementation of a Health Reimbursement Account ("HRA") plan for vested former players with three or more credited seasons who did not previously have an HRA and are under age 65.[399] Finally, the 2020 CBA created a dedicated hospital network to be available to former players which will provide primary care and other services free of charge, including screenings, mental health care, and certain orthopedic treatment for former players, and eventually for their spouses.[400]

There were, however, some changes to the total and permanent disability benefits that drew criticism. First, the amounts available were reduced from a range of $5,000 to $22,084 monthly[401] to $40,000 to $48,000 annually,[402] or $3,333.33 to $4,000 monthly. Next, the 2020 CBA now requires a reduction in a player's total and permanent disability benefits by the amount the player receives in Social Security benefits.[403] As a result, about 400 former players on total and permanent disability will see their disability benefits decrease.[404] In addition to the Social Security offset, a player's qualification criteria for disability payments under the 2020 CBA was tightened. In the 2011 CBA, players who received a disability determination from the Social Security Administration automatically qualified for disability benefits under the NFL CBA.[405] Beginning April 1, 2024, this automatic qualification no longer applies.[406] The NFLPA stated it agreed to cuts in the disability benefits to win increases in pension benefits, which it says will help more

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[396] NFLPA, *CBA Side by Side*, https://nflpaweb.blob.core.windows.net/media/Default/PDFs/CBA%20Side%20by%20Side%203.9.20%20FINAL.pdf [https://perma.cc/2HK2-SY24].

[397] *See id.*

[398] *See* Ken Belson, *Help for Disabled N.F.L. Players Is Sacrificed for Pension Deal,* N.Y. Times (Mar. 25, 2020), https://www.nytimes.com/2020/03/25/sports/football/nfl-retired-players-benefits.html [https://perma.cc/X4SN-8WJC].

[399] *CBA Side by Side*, *supra* note 396.

[400] *See id.*

[401] *See* Deubert et al., *supra* note 384, at 115.

[402] *See* 2020 CBA, *supra* note 16, at Art. 60, § 2.

[403] *See id.* at Art. 60, § 4.

[404] *See* Belson, *supra* note 398.

[405] *See* 2011 CBA, *supra* note 7, at Art. 61.

[406] *See* 2020 CBA, *supra* note 16, at Art. 60, § 6.

players.[407] Nevertheless, former players commenced a lawsuit against the NFLPA alleging that the changes violated the Employee Retirement Income Security Act.[408]

vii. Guaranteed Compensation

The concept of guaranteed compensation in the NFL has long been a subject of controversy and misunderstanding. As of 2017, approximately 44% of all contracted compensation in the NFL was guaranteed and approximately 70% of all players had at least some guaranteed compensation in their contract.[409] These numbers are much lower than those in MLB, the NBA, and the NHL.[410] However, as explained in *Comparing Health Related Policies & Practices*, "there are several reasons why fully guaranteed compensation might not be beneficial to players *collectively.*"[411] In short, more guaranteed compensation could mean less turnover and thus less opportunity for some players, as well as lower salaries generally, as clubs would seek to reduce their financial exposure.[412] It is a complex issue and "it is not clear [a higher] percentage of guaranteed compensation would maximize player health for the most NFL players."[413] For these reasons, the Law & Ethics Initiative recommended that "[t]he NFL and NFLPA should research the consequences and feasibility of guaranteeing more of players' compensation as a way to protect player health."[414]

While the 2020 CBA does not adopt the recommendation made, it does make some progress on this issue. As mentioned in *Comparing Health Related Policies & Practices*, one impediment to increasing guaranteed compensation was "the NFL's requirement that clubs deposit into a separate account the present value, less $2 million, of guaranteed compensation to be paid in future years."[415] Clubs used this rule as a reason for why they could not offer more guaranteed compensation.[416] The 2020 CBA materially changed this rule by increasing the deducted amount from $2 million to

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[407] *See* Belson, *supra* note 398.
[408] *See Cason v. National Football League Players Association*, No. 1:20-cv-01875 (D.D.C. filed July 10, 2020).
[409] *See* Deubert et al., *supra* note 384, at 178-79.
[410] *See id.* at 193.
[411] *Id.* at 195.
[412] *See id.*
[413] *Id.*
[414] *Id.*
[415] *Id.* at n. ab.
[416] *See id.*

$15 million, rising to $17 million in 2029.[417] This change will allow clubs to offer more guaranteed compensation with reduced cash flow concerns associated with funding a separate account.

IV. Other 2020 CBA Player Health & Safety Changes

Importantly, the new or modified health and safety provisions discussed in Section III are not exhaustive of such provisions of the 2020 CBA – they merely reflected those with connections to FPHS work. This Section will address some additional player health and safety provisions included as part of the 2020 CBA: practice limitations, emergencies, and Concussion Protocol enforcement.

First, the NFL and the NFLPA implemented practice limitations as part of the 2020 CBA. No team may hold more than four joint practices (*i.e.*, practices with another club) in the preseason.[418] The 2020 CBA limits padded practices to 16 in training camp (the previous limit was 28) and prohibits three consecutive days of padded practices (there was no prior limit).[419] Additionally, there will be a five-day "acclimation period" at the start of training camp that places restrictions on certain activities.[420] Following the "acclimation period," players will not be permitted on the field for more than four hours per day between two practices, and no practices can last more than two and a half hours.[421] Beginning in 2020, players are not allowed to be on the field for more than 12 hours per day; this number then decreases in subsequent seasons.[422] Additionally, in the event the season extends to 17 games, it will be required that players have a bye week after the third preseason game and teams will not be able to add any padded practices during the regular season.[423]

Second, as part of the 2020 CBA, the parties will retain an expert in emergency medicine to create a standardized emergency action plan ("EAP") for each club.[424] As the name suggests, the EAP is intended to provide a response to any type of medical emergency that may occur on a

[417] *See* 2020 CBA *supra* note 16, at Art. 26, § 9.

[418] *See* Dan Graziano, *NFL CBA Approved: What Players Get in New Deal, How Expanded Playoffs and Schedule Will Work*, ESPN (Mar. 15 2020), https://www.espn.com/nfl/story/_/id/28901832/nfl-cba-approved-players-get-new-deal-how-expanded-playoffs-schedule-work [https://perma.cc/2WEV-S96P].

[419] *See id.*

[420] *See id.*

[421] *See id.*

[422] *See id.*

[423] *See id.*

[424] *See* 2020 CBA, *supra* note 16, at Art. 39, § 4.

football field. More specifically, the EAP must address player medical, cardiac, and/or surgical emergencies that occur at home games as well as at the practice facility; identify local trauma centers; identify airway management physicians; identify appropriate local doctors for visiting clubs; determine the transportation methods in the event of an emergency; and conduct drills to prepare for such emergencies.[425]

Third, the 2020 CBA added meaningful mechanisms to enforce the Concussion Protocol. As discussed in *Protecting and Promoting*, at the time of that report, there were some concerns that players occasionally were not taking the Concussion Protocol seriously enough and that players with possible concussions sometimes were not removed from games when they should have been.[426] For these reasons, the authors recommended that "[t]he NFL and NFLPA should continue and intensify their efforts to ensure that players take the Concussion Protocol seriously."[427]

Subsequent to the report's 2016 release, there were an increasing number of instances in which it appeared that the Concussion Protocol was not being followed.[428] The 2020 CBA sets forth the procedures and potential discipline for such lapses. The Concussion Protocol now includes a mandatory checklist of steps for each suspected concussion.[429] Next, both the NFL and NFLPA shall appoint representatives to receive complaints of potential violations of the Concussion Protocol.[430] Those representatives are then to undertake an investigation of the complaint and, within three weeks, the NFL and NFLPA are to confer and agree on a proper disciplinary response.[431] If they are unable to agree, the matter is "immediately referred to the Impartial Arbitrator."[432]

> The Impartial Arbitrator shall determine: (1) whether a Club employee or member of a Club's medical team knowingly and materially failed to follow any of the mandatory steps in the NFL Concussion Checklist and, if

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[425] *See id*.

[426] *See Protecting and Promoting*, *supra* note 3, at 72, 359.

[427] *Protecting and Promoting*, *supra* note 3, at 242-43.

[428] *See* Mike Florio, *NFL Will Investigate Tom Savage Concussion Protocol*, NBC SPORTS (Dec. 11, 2017, 11:49 AM), https://profootballtalk.nbcsports.com/2017/12/11/nfl-will-investigate-tom-savage-concussion-protocol/ [https://perma.cc/M3RY-VZ4H]; Mike Florio, *Seahawks Clearly Violated Concussion Protocol; What Will NFL Do About It?*, NBC SPORTS, (Nov. 12, 2017, 7:44 AM), https://profootballtalk.nbcsports.com/2017/11/12/seahawks-clearly-violated-concussion-protocol-what-will-nfl-do-about-it/ [https://perma.cc/Y3GV-GM8S].

[429] *See* 2020 CBA *supra* note 16, at Art. 39, § 17(b).

[430] *See id.*

[431] *See id.*

[432] *Id.* at Art. 39, § 17(b)(4).

> so, (2) whether there were any relevant mitigating or aggravating factors present in the incident, including, without limitation: (a) whether the deviation resulted from an ambiguity in the Checklist or its failure to address the facts triggering the underlying violation, (b) whether any player interfered with the Club employee or medical team's ability to perform its duties, and (c) whether competitive concerns motivated the deviation.[433]

In the case of a first violation, the relevant club employees or medical staff are to be reprimanded and attend remedial education, and the club is to be fined up to $500,000.[434] If there are aggravating circumstances the fine can be as low as $100,000.[435] A second violation in the same league year results in a fine of at least $250,000 against the club, plus whatever other measures the Commissioner deems warranted.[436] Under a previous policy, the first violation resulted in either fines of anywhere from $50,000 to $150,000 or loss of draft picks, and fines for second and subsequent violations resulted in a minimum fine of $100,000.[437]

Moreover, in addition to the above-described penalties,

> [i]f the Commissioner determines that the violation of the NFL Concussion Checklist was motivated by competitive considerations (*e.g.*, intent to leave player in game and knowingly, intentionally and materially disregard the Protocol in order to gain a competitive advantage), the Commissioner may require the club to forfeit draft picks and pay additional fines exceeding those amounts set forth above.[438]

Finally, the new enforcement mechanisms contain an interesting, player-specific component. In the event that a player interferes with the medical staff's duties under the Concussion Protocol, such interference shall be considered a mitigating factor and be used as a mitigating defense by the team.[439] As discussed above, it is important that players take the Concussion Protocol seriously. However, this provision creates the possibility that in the event a club violates the Concussion Protocol, it will claim that a player contributed to its noncompliance in an attempt to mitigate its discipline.

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[433] *Id.* at Art. 39, § 17(b)(4)(a).

[434] *See id.* at Art. 39, § 17(c)(1).

[435] *See id.*

[436] *See id.* at Art. 39, § 17(c)(2).

[437] *See NFL Teams Now Face Fines, Loss of Draft Picks If They Violate Concussion Protocol*, ESPN.COM (July 25, 2016), https://www.espn.com/nfl/story/_/id/17142331/nfl-teams-now-face-fines-loss-draft-picks-violate-concussion-protocol [https://perma.cc/XDN5-VSUT].

[438] 2020 CBA *supra* note 16, at Art. 39, § 17(c)(3).

[439] *See id.* at Art. 39, § 17(d).

Conclusion

This Article demonstrates that the NFL and NFLPA made meaningful progress on a wide range of issues affecting NFL player health in the 2020 CBA. In particular, the addition of a Behavioral Health Specialist, Mental Health and Wellness Team, and Joint Behavioral Health Committee should help players better cope with the very important but often less visible challenges of a career in the NFL; similarly, the new Pain Management Specialist and Prescription Drug Monitoring Program should help players better handle the physical toll of their jobs while also taking into consideration their long-term health; new rules will protect player privacy in the rapidly developing area of biotechnologies; an identified and increased focus on assisting players with transitioning out of the NFL is welcome; stricter certification requirements for club support staff will help ensure that players are only working with the highest-qualified professionals; new research protocols will hopefully help to ensure players are treated with the dignity required of such studies; and tweaks to squad size rules could help to protect players with concussions from the pressure to return to the field too soon.

As demonstrated by the above list, fortunately, it appears that the NFL and NFLPA heeded the findings and recommendations of the Law and Ethics Initiative of the Football Players Health Study at Harvard University. Moreover, it appears that the parties will continue funding important research on these issues. The 2020 CBA, like the 2011 CBA, provides funding for "medical research"[440] and the Football Players Health Study is ongoing.[441]

Nevertheless, as discussed at length in Section III.A, the NFL and NFLPA have still failed to meaningfully address one of the principal legal and ethical issues concerning player health – the conflicted structure in which club medical staff provide services to both players and the clubs. Indeed, the NFL and NFLPA have yet to articulate a coherent response to the Law and Ethics Initiative's extensive analysis of, and recommendation on, this issue. Consequently, while the 2020 CBA represents important progress on player health and safety issues, there is still work to be done.

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[440] *Id.* at Art. 12, § 5.

[441] *OPEN STUDIES: Ways You Can Participate,* Football Players Health Study at Harv. U, https://footballplayershealth.harvard.edu/for-former-players/open-studies/ [https://perma.cc/QQ3V-BE2W] (last visited Oct. 21, 2020).