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## Use of the NFLPA's Collective Bargaining Agreement to Tackle Health and Safety Issues Plaguing Active and Retired NFL Players

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# USE OF THE NFLPA'S COLLECTIVE BARGAINING AGREEMENT TO TACKLE HEALTH AND SAFETY ISSUES PLAGUING ACTIVE AND RETIRED NFL PLAYERS

## INTRODUCTION

In recent years, the National Football League (hereinafter “NFL”) has faced continuous public scrutiny as a result of its treatment of injuries regarding active and retired players.<sup>1</sup> The criticism has mainly focused on concussions and repeated head trauma suffered by players in games.<sup>2</sup> The negative publicity in the media and in the public has been amplified as a result of Netflix’s Aaron Hernandez documentary released in January 2020.<sup>3</sup> The popular documentary detailed Hernandez’s short yet successful football career as a tight end and his personal struggles that plagued him off the field.<sup>4</sup> The documentary explored how Hernandez’s continuous legal troubles, tendencies toward violence, and mental immaturity may have been due to the brain degeneration he was suffering as a result of his football career.<sup>5</sup> While playing for the New England

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1. See generally Adam Kilgore & Scott Clement, *Poll: Nine in 10 Sports Fans Say NFL Brain Injuries are a Problem, but 74 Percent are Still Football Fans*, WASH. POST (Sept. 6, 2017), [https://www.washingtonpost.com/sports/poll-nfl-remains-as-popular-as-ever-despite-head-injuries-other-concerns/2017/09/06/238bef8a-9265-11e7-8754-d478688d23b4\\_story.html](https://www.washingtonpost.com/sports/poll-nfl-remains-as-popular-as-ever-despite-head-injuries-other-concerns/2017/09/06/238bef8a-9265-11e7-8754-d478688d23b4_story.html) (displaying that fans named head injuries and injuries caused by hitting and tackling as a problem in the NFL).

2. See *id.*

3. See generally *KILLER INSIDE: THE MIND OF AARON HERNANDEZ* (Netflix 2020) (three-part documentary detailing Hernandez’s early life, time with the Patriots, and trial and conviction for the murder of Odin Lloyd).

4. See Tadd Haislop, *Aaron Hernandez Timeline: From Murders and Trials to Prison Suicide*, SPORTING NEWS (Jan. 18, 2020), <https://www.sportingnews.com/us/nfl/news/aaron-hernandez-timeline-murders-trials-prison-suicide/1886y82a8bgyx123qxcgg04lb5>. Hernandez had legal troubles prior to his start in the NFL. See *id.* He had a reputation in college for trying to fight others while out at nightclubs. See *id.* While in college at the University of Florida he had been involved in multiple bar fights and was suspected in a double shooting in Florida. *Id.* Further, while playing for the New England Patriots, Hernandez also possessed weapons and associated with known drug dealers. See Netflix, *supra* note 3.

5. See Joseph P. Kahn, *Did Brain Damage from Football Contribute to the Violent Life of Aaron Hernandez*, BOSTON GLOBE (Sept. 23, 2021), <https://www.bostonglobe.com/2021/09/23/magazine/did-brain-damage-football-contribute-violent-life-aaron-hernandez/>.

Patriots, Hernandez was not liked in the locker room by his teammates and many players referred to him as “unhinged.”<sup>6</sup> Hernandez was known throughout his time in the NFL as paranoid and aggressive, both characteristics which are associated with brain damage and chronic traumatic encephalopathy (hereinafter “CTE”) as a result of repeated head trauma.<sup>7</sup> Hernandez played three seasons with the New England Patriots prior to being arrested and later convicted for murder of his friend, Odin Lloyd, in 2015.<sup>8</sup> Hernandez committed suicide in 2017 while in prison serving a life sentence without the possibility of parole.<sup>9</sup>

It was revealed in his autopsy that Hernandez suffered from CTE at the time of his suicide.<sup>10</sup> The researchers that examined Hernandez’s brain stated that he had the “the most severe case of [CTE] ever discovered in a person his age.”<sup>11</sup> Following these medical findings, Hernandez’s family brought a lawsuit against the NFL and the New England Patriots seeking damages for the “depriv[ation] of love, affection, and companionship that Hernandez would have provided his daughter while he was alive.”<sup>12</sup> The family’s suit also asserted that the preseason exams and physicals conducted by the New England Patriots’ staff should have

6. See Tom Schad & Kevin Allen, *Report Details Aaron Hernandez’s Erratic Behavior While with Patriots*, USA TODAY (Oct. 15, 2018), <https://www.usatoday.com/story/sports/nfl/patriots/2018/10/16/aaron-hernandez-behavior-patriots-boston-globe/1656467002> (stating that Hernandez’s New England Patriots teammates believed that he was an “attention-seeker” and “unpredictable”).

7. See Alaa Abdeldaiem, *Ex-Teammates Recall Aaron Hernandez’s Erratic Behavior While with Patriots*, SPORTS ILLUSTRATED (Oct. 16, 2018), <https://www.si.com/nfl/2018/10/16/aaron-hernandez-ex-teammates-describe-erratic-behavior-patriots>; see also Kahn, *supra* note 5 (explaining that researchers called Hernandez’s CTE “the worst case anyone had ever seen in a person that young”).

8. See Haislop, *supra* note 4; Connor Howe, *NFL Draft 2010 Results: Pick-by-Pick Selections*, SB NATION, <https://www.sbnation.com/nfl/2017/4/24/15415290/2010-nfl-draft-results-picks-selection-order> (last updated Apr. 25, 2017).

9. See *Aaron Hernandez Found Dead After Hanging in Prison Cell*, ESPN (Apr. 19, 2017), [https://www.espn.com/nfl/story/\\_/id/19191248/former-new-england-patriots-te-aaron-hernandez-found-dead-hanging-prison-cell](https://www.espn.com/nfl/story/_/id/19191248/former-new-england-patriots-te-aaron-hernandez-found-dead-hanging-prison-cell).

10. See Richard Gonzales, *Researcher Says Aaron Hernandez’s Brain Showed Signs of Severe CTE*, NPR (Nov. 9, 2017), <https://www.npr.org/sections/thetwo-way/2017/11/09/563194252/researcher-says-aaron-hernandez-s-brain-showed-signs-of-severe-cte>.

11. See Adam Kilgore, *Aaron Hernandez Suffered from the Most Severe CTE Ever Found in a Person His Age*, WASH. POST (Nov. 9, 2017), [https://www.washingtonpost.com/sports/aaron-hernandez-suffered-from-most-severe-cte-ever-found-in-a-person-his-age/2017/11/09/fa7cd204-c57b-11e7-afe9-4f60b5a6c4a0\\_story.html](https://www.washingtonpost.com/sports/aaron-hernandez-suffered-from-most-severe-cte-ever-found-in-a-person-his-age/2017/11/09/fa7cd204-c57b-11e7-afe9-4f60b5a6c4a0_story.html) (stating that Hernandez suffered from Stage 3 CTE, “which had never been seen in a brain younger than forty-six years old”).

12. See *In re Nat’l Football League Players’ Concussion Inj. Litig.*, No. 16-2058, 2019 WL 634640, at \*4 (E.D. Pa. Feb. 14, 2019); see also Rick Maese, et al., *NFL Says it Will ‘Vigorously’ Fight CTE Lawsuit Filed by Aaron Hernandez*, WASH. POST (Sept. 22, 2017), <https://www.washingtonpost.com/news/early-lead/wp/2017/09/21/aaron-hernandez-was-suffering-from-advanced-form-of-cte-family-files-suit-against-nfl>.

detected symptoms of cognitive impairment.<sup>13</sup> The lawsuit stated that the NFL was aware of the dangers associated with the sport, specifically regarding head trauma, and did nothing to protect Hernandez from these dangers.<sup>14</sup> The lawsuit was dismissed in 2019 by a federal court judge because Hernandez's estate missed the 2014 deadline to opt out of the NFL's concussion settlement.<sup>15</sup>

The Aaron Hernandez documentary propelled conversation regarding the NFL's regulation of its players' health and safety into current conversation.<sup>16</sup> However, the dangers and health issues resulting from repeated head injuries and concussions is not new for the NFL.<sup>17</sup> Dave Duerson, a standout safety who played the majority of his career for the Chicago Bears, died as a result of a self-inflicted gunshot wound to the chest in 2011 at age fifty.<sup>18</sup> After retiring from his successful football career, Duerson remained active within the NFL sphere as a leader within the National Football League Players Association and also ran a successful food company.<sup>19</sup> However, toward the end of his life his memory began to fade; both he and his company went bankrupt, and he pleaded guilty to misdemeanor domestic-battery charges.<sup>20</sup> At the time, those close to him did not connect the changes in his behavior to

13. See Maese, *supra* note 12.

14. See *id.*

15. See *In re Nat'l Football League Players' Concussion Inj. Litig.*, 2019 WL 634640, at \*10 (E.D. Pa. Feb. 14, 2019); see also Maryclaire Dale, *Judge: Hernandez's Child Can't Sue NFL Over Brain Disease*, ASSOCIATED PRESS (Feb. 15, 2019), <https://apnews.com/aef6d8b58d30b4d6cb1f5cc395147ada7> (stating the suit was thrown out because Hernandez's estate missed the 2014 deadline to opt out of the NFL's concussion settlement).

16. See Kelly McLaughlin, *'They're in the Violence Business': The Aaron Hernandez Documentary Highlights How the Brain Disease CTE has Affected the Entire NFL*, INSIDER (Jan. 15, 2020), <https://www.businessinsider.com/aaron-hernandez-netflix-documentary-cte-problems-nfl-2020-1> (highlighting that the documentary gives insight regarding how CTE affects NFL players "for the rest of their lives").

17. See *NFL Players with CTE*, CBS NEWS (Feb. 7, 2016), <https://www.cbsnews.com/pictures/nfl-football-players-with-cte/> (listing various players throughout the history of the NFL that were diagnosed with CTE).

18. See *id.*; see Ed Pilkington, *The NFL Star and the Brain Injuries That Destroyed Him*, *The Guardian* (July 19, 2011), <https://www.theguardian.com/science/2011/jul/19/nfl-star-brain-injuries-destroyed> (describing how Duerson played for eleven years in the NFL, winning two Super Bowls and being named NFL Man of the Year in 1987 and NFL Humanitarian of the Year in 1988).

19. See Alan Schwarz, *A Suicide, A Last Request, A Family's Questions*, *N.Y. TIMES* (Feb. 22, 2011), <https://www.nytimes.com/2011/02/23/sports/football/23duerson.html> (stating that Duerson became a member of the NFL's Retirement Board and ran a food company named Duerson Foods).

20. See *id.* (stating that his once successful food business went into receivership, his house was foreclosed on, and he filed for personal bankruptcy in the years leading up to his tragic suicide).

Duerson's career in the NFL and repeated collisions on the field.<sup>21</sup> Duerson's final request to his friends and family through his texts and suicide note was that his brain be donated to the NFL's brain bank to be studied in order to determine the effect the game had on his mental capacity.<sup>22</sup>

The struggles of former NFL players following retirement was again highlighted in 2012—after the suicide of former San Diego Chargers' star linebacker Junior Seau by a self-inflicted gunshot wound to the chest at age forty-three.<sup>23</sup> Seau's suicide sparked widespread concern among the media and public regarding the NFL's regulation of injuries.<sup>24</sup> Seau played twenty seasons in the NFL and developed a reputation for being "one of the most intense and intimidating players in the sport."<sup>25</sup> During his time in the NFL, Seau never reported suffering any concussions and had never appeared on an injury report for any head injuries.<sup>26</sup>

However, following an autopsy by the National Institutes of Health it was found that Seau suffered from CTE at the time of his death.<sup>27</sup> His family believes that his CTE diagnosis makes sense given the erratic decisions Seau made following his retirement from football.<sup>28</sup> Some of these actions included impulsive gambling, constant partying, accruing

21. *See id.*; *see also* Pilkington, *supra* note 18 (stating that Duerson's family can recall at least ten concussions, but state that he may have had many others that went undiagnosed and following suspected concussions, Duerson would always return to the game).

22. *See* Schwarz, *supra* note 19.

23. *See Junior Seau Dead at 43: Medical Examiner Rules Suicide*, NFL.COM (May 2, 2012), <https://www.nfl.com/news/junior-seau-dead-at-43-medical-examiner-rules-suicide-09000d5d828d07bd>.

24. *See* Mikaela Conley, *Junior Seau's Death After NFL: Is There a Brain Injury Link?*, ABC News (May 2, 2012), <https://abcnews.go.com/Health/junior-seau-dead-case-highlights-questions-nfl-violence/story?id=16264211>.

25. *See* Adam Wells, *Junior Seau Suffered from Traumatic Brain Disease Known as CTE*, BLEACHER REP. (Jan. 9, 2013), <https://bleacherreport.com/articles/1478778-junior-seau-suffered-from-traumatic-brain-disease-known-as-cte>.

26. *See* Jim Avila et al., *Junior Seau Diagnosed with Disease Caused by Hits to Head: Exclusive*, ABC NEWS (Jan. 9, 2013), <https://abcnews.go.com/US/junior-seau-diagnosed-brain-disease-caused-hits-head/story?id=18171785> (stating that although Seau was never formally diagnosed with a concussion, he often complained of symptoms that are frequently linked to concussions); *Junior Seau Death Raises Questions*, ESPN (May 3, 2012), [https://www.espn.com/nfl/story/\\_/id/7886162/report-boston-university-seeking-study-junior-seau-brain](https://www.espn.com/nfl/story/_/id/7886162/report-boston-university-seeking-study-junior-seau-brain).

27. *See* Sam Farmer, *Junior Seau Had Brain Disease When He Committed Suicide*, L.A. TIMES (Jan. 10, 2013), <https://www.latimes.com/sports/la-xpm-2013-jan-10-la-sp-sn-junior-seau-brain-20130110-story.html> (following Seau's suicide his family agreed to have his brain studied to determine if there was a link between his football career and suicide).

28. *See* Mark Fainaru-Wada & Steve Fainaru, *Doctors: Junior Seau's Brain had CTE*, ESPN (Jan. 11, 2013), [https://www.espn.com/espn/otl/story/\\_/id/8830344/study-junior-seau-brain-shows-chronic-brain-damage-found-other-nfl-football-players](https://www.espn.com/espn/otl/story/_/id/8830344/study-junior-seau-brain-shows-chronic-brain-damage-found-other-nfl-football-players).

large amounts of debt, and his arrest following an accusation of assault.<sup>29</sup> Friends of Seau also stated that during the time directly prior to his suicide he began having memory problems, forgetting important family events and appointments.<sup>30</sup> At the time, his family attributed his actions to missing football and the regimented schedule he had become accustomed to.<sup>31</sup> Seau's lack of impulse control, memory loss, and obsessive-compulsive behavior has now been linked to his diagnosis of CTE.<sup>32</sup>

Studies regarding CTE have raised significant concerns about the safety of NFL players and the long-term effects of the physicality of the game.<sup>33</sup> CTE manifests in symptoms such as depression, suicidal thoughts, anxiety, lack of impulse control, anger, disinhibition, and memory loss.<sup>34</sup> Presently, CTE can only be diagnosed after death.<sup>35</sup> A study conducted at Boston University in 2017 diagnosed CTE in 110 out of 111 brains that had been donated by the families of deceased former NFL players.<sup>36</sup> Boston University's CTE Center is the leading research institute for understanding football's effect on the brains of former players and is funded by the National Institutes of Health.<sup>37</sup> Through its research, the studies done by Boston University have found that for every year spent playing tackle football, the risk of a player developing CTE increases by

29. See Shelley Smith, *Lives After Junior*, ESPN (May 2, 2013), [https://www.espn.com/nfl/story/\\_id/9410051/a-year-later-one-junior-seau-close-friends-comes-forward-recount-version-descent](https://www.espn.com/nfl/story/_id/9410051/a-year-later-one-junior-seau-close-friends-comes-forward-recount-version-descent) (stating that Seau also struggled with heavy drinking, began taking sleeping pills in order to sleep, and had many failed business ventures that contributed to his financial struggles).

30. See *id.*

31. See *id.* (stating that Seau struggled following his retirement, failing to secure an NFL broadcasting job, depleting his savings, and incurring gambling debts).

32. See *id.* (looking back on Seau's actions prior to his death his friends and family now believe that he was exhibiting symptoms of CTE, but that they "were noticed only in pieces, never being linked together" and that "no one completed the puzzle until it was too late").

33. See generally *What is CTE?*, CONCUSSION LEGACY FOUND., <https://concussionfoundation.org/CTE-resources/what-is-CTE> (last visited Feb. 4, 2021) (explaining that the highest amount of cases of CTE has been found amongst tackle football players).

34. See generally *Chronic Traumatic Encephalopathy (CTE)*, ALZHEIMER'S ASSOC., [https://www.alz.org/alzheimers-dementia/what-is-dementia/related\\_conditions/chronic-traumatic-encephalopathy-\(cte\)#:~:text=Chronic%20traumatic%20encephalopathy%20\(CTE\)%20is,changes%20including%20aggression%20and%20depression](https://www.alz.org/alzheimers-dementia/what-is-dementia/related_conditions/chronic-traumatic-encephalopathy-(cte)#:~:text=Chronic%20traumatic%20encephalopathy%20(CTE)%20is,changes%20including%20aggression%20and%20depression) (last visited Sept. 16, 2020) (listing symptoms of CTE).

35. See Lisa Brown, *CTE Risk More Than Double After Just Three Years Playing Football*, BOSTON UNIV. (Oct. 7, 2019), <http://www.bu.edu/articles/2019/cte-football/#:~:text=For%20every%20year%20of%20absorbing,disease%2C%20increases%20by%2030%20percent>.

36. Barbara Moran, *CTE Found in 99 Percent of Former NFL Players Studied*, BOSTON UNIV.: THE BRINK (July 26, 2017), <http://www.bu.edu/articles/2017/cte-former-nfl-players/>.

37. See generally BOSTON UNIV. RSCH. CTE CTR., *About the Center*, <https://www.bu.edu/cte/about/> (last visited Jan. 26, 2021) (providing information about the research center, noting the research conducted at the CTE center).

thirty percent.<sup>38</sup> This data has provided concrete evidence to suggest that there is a likely relationship between football and the development of CTE.<sup>39</sup>

As public scrutiny has increased regarding the NFL's treatment of injuries and its players, the NFL has been forced to implement new health and safety programs in an attempt to prevent debilitating injuries to players.<sup>40</sup> Many of these programs have come as a result of collaboration with the National Football League Players Association (hereinafter "NFLPA") through the recently renegotiated Collective Bargaining Agreement (hereinafter "CBA").<sup>41</sup> Additionally, the rising level of NFL control over health and safety of players was again seen through its response to the Coronavirus pandemic where the NFL once again asserted regulatory authority over players and the individual club teams.<sup>42</sup> The NFL's recent and continuous involvement in programs regarding the well-being of its players may provide precedent for an expansion of liability to the NFL for player injuries, as the NFL is beginning to behave more like an employer than ever before.<sup>43</sup> Regarding its retired players, the NFL's pension plan, governed by the Employee Retirement Income Security Act (hereinafter "ERISA"), may give rise to the threat of increased litigation.<sup>44</sup> The pension plan opens the NFL to claims of breach of fiduciary duty under ERISA as a result of the disability board due to its composition and funding of awards.<sup>45</sup>

This note will argue that a reform of the CBA between the NFL and the NFLPA, building upon the established precedent of NFL oversight of healthcare and retirement plans, would aid in better protecting and assisting active and former NFL players.<sup>46</sup> Part I will provide a background into the NFL's treatment of player injuries, specifically concussions.<sup>47</sup> It will also examine the structure of the NFL and the rights given to individual clubs, which include injury care.<sup>48</sup> Part I will conclude with a discussion of medical plans for both active and retired players and

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38. See Brown, *supra* note 35 (stating that the study additionally found that for "every 2.6 years of play, the risk for developing CTE doubles").

39. See Moran, *supra* note 36 (displaying that the "data suggest[s] that there is very likely a relationship between exposure to football and developing the disease").

40. See *infra* Section II.A.

41. See *infra* Section II.A.

42. See *infra* Section II.B.

43. See *infra* Section II.C.

44. See *infra* Section II.D.

45. See *infra* Section II.D.

46. See *infra* Section III.

47. See *infra* Section I.A-B.

48. See *infra* Section I.C-D.

litigation concerning the plans.<sup>49</sup> Part I will also detail the struggles that retired players face when attempting to qualify for disability benefits from the NFL.<sup>50</sup> Part II will analyze how the NFL has been able to avoid liability for player injuries while taking on responsibilities regarding the health and safety of players.<sup>51</sup> Part III will propose that the CBA be renegotiated to allocate injury care of active players to the NFL.<sup>52</sup> Further, Part III will recommend that the CBA renegotiation include a change in the composition of the disability board and clear standards with very little discretion regarding disability awards to retired players.<sup>53</sup>

## I. BACKGROUND

Part I of this note will detail how the NFL previously dealt with claims that there was a potential link between chronic brain injury and football and how the NFL's assessment has since changed today.<sup>54</sup> This section will also examine the structure of the NFL and the rights the NFL gives its member teams through the NFL Constitution with a specific focus on medical and injury care.<sup>55</sup> Additionally, this section will address the CBA that was recently re-negotiated by the NFLPA with respect to the allocation for injury care prevention between the NFL and the teams.<sup>56</sup> Further, this section will elaborate on NFL medical plans for current and former players and the litigation that has become prevalent among NFL players and their families as they fight for benefits and compensation for debilitating injuries received as a result of a career in football.<sup>57</sup>

### A. *The NFL's Previous Denial of a Link Between Football and Brain Injuries*

In the past, the NFL had publicly denied the existence of brain injuries such as CTE and its link to football.<sup>58</sup> Further, the NFL and its representatives continuously downplayed the severity of concussions

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49. See *infra* Section I.E-G.

50. See *infra* Section I.E.

51. See *infra* Section II.A-C.

52. See *infra* Section III.A.

53. See *infra* Section III.B.

54. See *infra* Section I.A-B.

55. See *infra* Section I.C.

56. See *infra* Section I.C-D.

57. See *infra* Section I.E-G.

58. See Jason M. Breslow, *NFL Acknowledges a Link Between Football, CTE*, PBS (Mar. 15, 2016), <https://www.pbs.org/wgbh/frontline/article/nfl-acknowledges-a-link-between-football-cte/>.



suffered by players.<sup>59</sup> The earliest examples of the NFL's nonchalant attitude toward concussions and brain injuries were seen in 1994 when the former chair of the Mild Traumatic Brain Injury Committee (hereinafter "MTBIC"), Dr. Elliot Pellman, described concussions as "an occupational risk" in an interview with *Sports Illustrated*.<sup>60</sup> Prior to his appointment to the MTBIC by the NFL, Dr. Pellman had no experience in the area of neuroscience and believed that the more pressing problems in the NFL surrounded players' drinking and steroid abuse.<sup>61</sup> Despite his continued insistence that there was no link between football and CTE, he remained the chief medical officer of the NFL until 2016 when he retired.<sup>62</sup> The NFL's continued apathy regarding a link between football and brain injuries continued in 2004, when the MTBIC published a paper that stated that as a result of continued play, NFL players have evolved to where they "are probably less susceptible to [Mild Traumatic Brain Injury] and prolonged post-concussion syndrome than the general population."<sup>63</sup> Further, in 2005 the MTBIC stated that after suffering a concussion in a game, there is no increased risk of injury for players when returning to the same game.<sup>64</sup> Dr. Pellman and the MTBIC explained that players who return to the game may suffer from less symptoms than those that do not return.<sup>65</sup>

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59. See generally Lauren Ezell, *Timeline: The NFL's Concussion Crisis*, PBS: FRONTLINE (Oct. 8, 2013), <https://www.pbs.org/wgbh/pages/frontline/sports/league-of-denial/timeline-the-nfls-concussion-crisis> (detailing a timeline of the NFL actions and statements from high-ranking NFL officials over the years regarding the risk of concussions and its link to the game from 1994-2013).

60. See *id.*; see also Ta-Nehisi Coates, *The NFL's Response to Brain Trauma: A Brief History*, THE ATL. (Jan. 25, 2013), <https://www.theatlantic.com/entertainment/archive/2013/01/the-nfls-response-to-brain-trauma-a-brief-history/272520/> (expanding on Dr. Pellman's "occupational risk" quote and showing him compare football players to "a steelworker who goes up 100 stories, or a soldier").

61. See Ezell, *supra* note 59.

62. Ryan Van Bibber, *The NFL Finally Cuts Ties with the Doctor who Made a Career Out of Denying CTE*, SB NATION (July 20, 2016, 1:38 PM), <https://www.sbnation.com/2016/7/20/12239202/nfl-concussions-cte-elliott-pellman> (stating that Dr. Pellman retired after thirty years of service with the NFL and had been a member of the Mild Traumatic Brain Injury Committee since 2003).

63. See Ezell, *supra* note 59.

64. See *id.*; see also Elliot J. Pellman, M.D. & David C. Viano, M.D., *Concussion in Professional Football*, 21 J. OF NEUROSURGERY 1, 10 (2006) (citing Dr. Pellman's MTBIC study finding that "[m]any NFL players can be safely allowed to return to play on the day of the injury after sustaining a mild [traumatic brain injury]").

65. See Pellman & Viano, *supra* note 64, at 9 (stating that "players who suffered concussions and returned to the same game have fewer initial signs and symptoms than those who were removed from play").

In 2007, Dr. Pellman stepped down as head of MTBIC and was replaced by co-chairs, Drs. Ira Casson and David Viano.<sup>66</sup> Dr. Casson continued to deny a link between football and brain damage.<sup>67</sup> Dr. Casson testified to the House Judiciary Committee that there was not enough, “valid, reliable, or objective scientific evidence at present to determine whether or not repeat head impacts in professional football result in long-term brain damage.”<sup>68</sup> Dr. Casson referred to CTE as a disease that affects athletes such as boxers and horse jockeys, not NFL players.<sup>69</sup> Prior to working for the NFL, Dr. Casson had conducted research regarding the link between boxing and chronic brain injury.<sup>70</sup> However, he continued to stand firm in his position that his research displayed that there was no link between football and brain injury, despite similarities in the physicality of the two sports.<sup>71</sup>

### B. Recent Attempts by the NFL to Prevent Injuries to Players

Presently, the NFL has changed its tune, possibly as a result of the negative publicity and increased litigation from former players, and has attempted to enact new policies to better ensure the safety and continued health of players.<sup>72</sup> Examples of these policies include the monitoring of games by independent neurotrauma consultants and step-by-step procedures to identify and treat injuries.<sup>73</sup> However, these independent neurotrauma consultants provided by the NFL do not perform any of the follow-up care regarding injuries sustained, the follow-up care continues

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66. See Ezell, *supra* note 59.

67. See *id.*

68. See Alan Schwarz, *Congress Examines N.F.L. Concussions*, N.Y. TIMES (Jan. 4, 2010), <https://www.nytimes.com/2010/01/05/sports/football/05concussions.html>.

69. See Ezell, *supra* note 59.

70. See Ike Swetlitz & Bob Tedeschi, *After a Public Fall, the Face of NFL Concussion Denial Resurfaces*, STAT (Apr. 28, 2016), <https://www.statnews.com/2016/04/28/concussion-football-ira-casson-science> (stating that in the 1980s Dr. Casson had conducted a study that revealed a link between boxing and chronic brain damage).

71. See *id.* Dr. Casson's research displayed that the majority of players he examined had no clinical signs of chronic brain damage. See *id.* Dr. Casson's findings have been widely disputed by others in his field. See *id.*

72. See generally *Building a Better Game*, NFL PLAYER HEALTH & SAFETY, <https://www.playsmartplaysafe.com/?sp-el-lp-bm-gg-1800003> (last visited Oct. 21, 2020) (showing the official NFL website created solely for updates regarding changes made for health and protection of players).

73. See *Concussion Protocol & Return-to-Participation Protocol: Overview*, NFL PLAYER HEALTH & SAFETY (June 22, 2018), <https://www.nfl.com/playerhealthandsafety/health-and-wellness/player-care/concussion-protocol-return-to-participation-protocol> (detailing the game day procedure, concussion game day protocol, and standards for treatment following injury).

to be done by the player's team.<sup>74</sup> Additionally, there are concerns about how independent these doctors actually are when they are examining a player on the sideline surrounded by his team and the team's own medical professionals.<sup>75</sup> The NFL has also added mandatory training and educational programs in collaboration with the American Academy of Neurology for active players regarding the risks of brain injuries and how to identify the symptoms of these injuries during games.<sup>76</sup> This collaboration with the Academy of Neurology also advocates for players to speak up if they believe they have suffered a concussion by alerting team athletic trainers and physicians.<sup>77</sup> Further modifications to promote player safety can be seen through new regulations the NFL has enacted to change how the game is played.<sup>78</sup> For example, players are no longer permitted to tackle defenseless players "forcibly... [in the] head or neck area" in an attempt to prevent injuries from occurring.<sup>79</sup>

Though these policies are a start, there has not been an immediate positive impact on reducing the amount of injuries, such as concussions, suffered by players.<sup>80</sup> Data regarding the amount of concussions suffered by players displays that in 2016 there were 243 concussions suffered throughout the season, this number increased to 281 during the 2017 season.<sup>81</sup> Further, in 2019 there were 224 recorded for the season.<sup>82</sup> The incidence of concussion data reported by the NFL displays that there has not been an consistent decrease in the amount of concussions despite the

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74. See Dan Pompei, *Instead the NFL's Secret World of Injuries*, BLEACHER REP. (Dec. 14, 2017), <https://bleacherreport.com/articles/2749101-inside-the-nfls-secret-world-of-injuries> (stating that for many the independent neurologist has been a "welcome addition").

75. See *id.* (questioning how independent these neurologists are when thrust into situations on the sidelines with team officials surrounding them and the player).

76. See Press Release, Am. Acad. of Neurology, *New Concussion Training for NFL Players Ahead of This Week's Season Opener* (Sept. 6, 2016), <https://www.aan.com/PressRoom/Home/PressRelease/1490>.

77. See *id.*

78. See generally *Player Health & Safety*, NFL FOOTBALL OPERATIONS, <https://operations.nfl.com/football-ops/nfl-ops-honoring-the-game/health-safety> (last visited Oct. 21, 2020) (detailing the injury reduction plan put in place by the NFL in order to combat concussion which includes changes such as better performing helmets, rules changes, and funding for medical research).

79. See *NFL Video Rulebook: Defenseless Player*, NFL FOOTBALL OPERATIONS, <https://operations.nfl.com/the-rules/nfl-video-rulebook/defenseless-player> (last visited Sept. 16, 2020).

80. See *Injury Data Since 2015*, NFL PLAYER HEALTH & SAFETY (Oct. 26, 2020), <https://www.nfl.com/playerhealthandsafety/health-and-wellness/injury-data/injury-data> (displaying data from table labeled "Incidence of Concussion 2015-2021" stating the total amount of concussions from each season).

81. See *id.*

82. See *id.*

increased regulation of the game, educational programs, and discussion regarding the dangers of concussions.<sup>83</sup> The statistics also do not take into account the amount of unreported concussions suffered by players.<sup>84</sup> The data shows that the policies put in place have not been able to combat the physicality of the game.<sup>85</sup> As a result of the continued threat of injuries, many players are now choosing to retire early in their careers rather than risk further injury to their bodies.<sup>86</sup>

In January 2020, All-Pro middle linebacker Luke Kuechly of the Carolina Panthers retired at the age of twenty-eight after suffering multiple concussions during his time in the NFL.<sup>87</sup> In 2016, six-time Pro-Bowler Calvin Johnson of the Detroit Lions retired at the age of thirty.<sup>88</sup> When announcing his retirement, Johnson stated that he felt he could no longer perform at his best as a result of the continuous wear and tear on his body.<sup>89</sup> Following his retirement announcement, Johnson stated that he suffered from his “fair share” of concussions during his career.<sup>90</sup> In more recent interviews following his retirement, Johnson admitted that he suffered “at least nine concussions” during his time in the NFL.<sup>91</sup> However, injury reports from the Detroit Lions never stated that Johnson ever suffered from any concussions in his entire career with the team.<sup>92</sup>

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83. *See id.*

84. *See* Christian Red, *Despite New NFL Concussions Report, Self-Reporting Still Not Where It Needs To Be*, N.Y. DAILY NEWS (Feb. 28, 2018, 5:48 PM), <https://www.nydailynews.com/sports/football/nfl-concussion-report-self-reporting-needed-article-1.3847553> (stating that although self-reporting has gone up in recent years, players still “cannot be honest about every concussion if they want to stay in the game”).

85. *See* NFL PLAYER HEALTH & SAFETY, *supra* note 80.

86. *See generally* Nick Schwartz, *22 NFL Players Who Retired Early from Gronk to Barry Sanders*, USA TODAY (Jan. 15, 2020), <https://ftw.usatoday.com/2020/01/22-nfl-players-who-retired-early> (listing players who retired earlier than expected in their careers).

87. *See* Steve Almasy & Kevin Doston, *Luke Kuechly, Carolina Panthers Superstar Linebacker Announces Retirement at 28*, CNN (Jan. 15, 2020), <https://www.cnn.com/2020/01/14/us/carolina-panthers-luke-kuechly-retirement/index.html>.

88. *See* Sean Wagner-McGough, *Retired Receiver Calvin Johnson Explains Why He'll Never Play in the NFL Again*, CBS SPORTS (Dec. 21, 2016, 4:38 PM), <https://www.cbssports.com/nfl/news/retired-receiver-calvin-johnson-explains-why-hell-never-play-in-the-nfl-again> (detailing Johnson’s statement that he will never return to the game because of the lasting effects of injuries he sustained).

89. *See id.*

90. *See id.*

91. *See* Dave Birkett, *Calvin Johnson: Detroit Lions 'Wanted Me to Change My Story' About Suffering Concussions*, DETROIT FREE PRESS (Sept. 20, 2019, 3:30 PM), <https://www.freep.com/story/sports/nfl/lions/2019/09/20/calvin-johnson-detroit-lions-concussions-brain-injuries/2385684001> (reporting Johnson’s statement that he knew he had suffered a concussion during a game because he “blacked out”).

92. *See* Sean Wagner-McGough, *Calvin Johnson Never Listed as Suffering a Concussion but Says He Had His 'Fair Share'*, CBS SPORTS (July 6, 2016, 6:19 PM),

Johnson claims that this is because the team asked him to “change his story” regarding concussion symptoms he was experiencing.<sup>93</sup> More examples include Chris Borland, who retired after his rookie season with the San Francisco 49ers in 2015 citing concerns regarding his long-term health.<sup>94</sup> The increasing number of young players retiring displays that although the NFL has taken steps to improve safety of players, these steps have not been productive enough to keep some of its best players in the game.<sup>95</sup> Despite new health and safety programs implemented by the NFL, players have begun to think more critically about the impact the NFL has had on their health and have decided to retire as a result.<sup>96</sup>

### C. *The NFL Constitution and the Collective Bargaining Agreement*

The NFL is comprised of thirty-two teams, also called clubs, and is governed by the NFL Constitution.<sup>97</sup> The NFL Constitution details the relationship between the NFL and the member teams with a focus on the management of the NFL as a corporation.<sup>98</sup> When players enter the NFL, they sign a contract with the specific team they will play for, not the NFL as a whole.<sup>99</sup> The NFL player contract details the individual club’s responsibility to the player.<sup>100</sup> For example, the club has responsibility

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<https://www.cbssports.com/nfl/news/calvin-johnson-never-listed-as-suffering-a-concussion-but-says-he-had-his-fair-share> (stating that Johnson had 78 appearances on the NFL injury report and none mentioned concussions).

93. See Birkett, *supra* note 91 (reporting Johnson’s statement that he was not seeing straight, but the team did not want him to disclose these symptoms).

94. See Mark Fainaru-Wada & Steve Fainaru, *SF’s Borland Quits Over Safety Issues*, ESPN (Mar. 16, 2015), [https://www.espn.com/espn/otl/story/\\_/id/12496480/san-francisco-49ers-linebacker-chris-borland-retires-head-injury-concerns](https://www.espn.com/espn/otl/story/_/id/12496480/san-francisco-49ers-linebacker-chris-borland-retires-head-injury-concerns) (reporting Borland’s statement that after reviewing the link between football and neurological conditions the decision to retire was “simple”).

95. See Brown, *supra* note 35 (citing the premature retirement of Indianapolis Colts quarterback Andrew Luck and Detroit Lions wide receiver Calvin Johnson as examples of young and high-profile players that made the decision to end their NFL careers because of injuries suffered).

96. See *id.* (stating a goal of the studies being conducted regarding CTE is to guide players and physicians in “making informed decisions regarding play”).

97. See NFL CONST. art. III, §1.

98. See *generally* NFL CONST. art. III; NFL CONST. art. IV (detailing the membership requirements of clubs and the rights of NFL clubs in their home territory for commercial activities).

99. See NFL CONST. art. XV, §1 (stating that the NFL player contracts are between the players and the clubs).

100. See Collective Bargaining Agreement, NFL-NFLPA 334-43 (2020), [https://nflpaweb.blob.core.windows.net/media/Default/NFLPA/CBA2020/NFL-NFLPA\\_CBA\\_March\\_5\\_2020.pdf](https://nflpaweb.blob.core.windows.net/media/Default/NFLPA/CBA2020/NFL-NFLPA_CBA_March_5_2020.pdf) (displaying a sample standard NFL player contract detailing the player’s responsibility to the club and the club’s responsibilities to the player regarding compensation, medical treatment, and publicity).

for the player's salary and medical care if an injury occurs as a result of employment with the club.<sup>101</sup>

Additionally, NFL players are members of the NFLPA, which provides standards for the relationship between the individual teams and the players.<sup>102</sup> The NFLPA is a union that "allows players to stand together to protect their health, rights, and families."<sup>103</sup> The power of the NFLPA comes from the Board of Representatives, which are elected by the members of the NFLPA.<sup>104</sup> The players on each NFL team elect a "Player Representative" to the NFLPA that serves on the Board of Player Representatives.<sup>105</sup> One of the main responsibilities of the NFLPA is the maintenance of the relationship between the players and the teams.<sup>106</sup> This relationship is governed by the CBA which was recently re-negotiated by the NFLPA in March 2020 and will run until March 2030.<sup>107</sup> The CBA is entered into in accordance with the National Labor Relations Act.<sup>108</sup>

Players agree to be bound by the NFL Constitution when signing their contracts, but both the CBA and the NFL Constitution do not refer to the players as employees of the NFL.<sup>109</sup> The NFL Constitution refers to the players as being assigned to their club team and that immediately following the assignment, the club becomes responsible for the player.<sup>110</sup> While the CBA, in its definition section, states that the player contract signed between a prospective NFL player and a NFL club team makes that person an employee of that club.<sup>111</sup> As a result of this classification, the clubs retain most of the control over their players.<sup>112</sup> This control includes the regulation and care of player injuries.<sup>113</sup>

101. *See id.*

102. *See How the NFLPA Works*, NFLPA, <https://nflpa.com/about> (last visited Oct. 22, 2020) (stating that the NFLPA "[r]epresents all players in matters concerning wages, hours and working conditions[,] and protects their rights as professional football players").

103. *See id.*

104. *See id.* (detailing that the Board of Representatives of the NFLPA meets once a year to make decisions regarding the future of the union and ensures that the terms of the CBA are met).

105. *See id.*

106. *See id.*

107. *See id.* (stating that the recently re-negotiated CBA runs through the 2030 season).

108. *See NFL-NFLPA*, *supra* note 100, at xvi.

109. *See id.*; NFL CONST. art. XVI.

110. *See* NFL CONST. art. XVI, §1-2 (stating that "[i]mmediately following any assignment, the player shall report to the assignee club as promptly as possible and shall perform services with the assignee club as prescribed in said contract").

111. *See NFL-NFLPA*, *supra* note 100, at 2.

112. *See generally id.* at 334-43 (displaying how clubs control their players through their contracts).

113. *See infra* Section I.D.

#### D. *The NFL's Regulation of Player Injuries*

The NFL Constitution says little about the protocol regarding player injuries, as there is only one small section in the NFL Constitution that details standards for individual clubs regarding injuries to players.<sup>114</sup> Each of the individual football clubs retain control regarding the treatment and diagnosis of their own players.<sup>115</sup> It is stated in the NFL Constitution that “all determinations of recovery time for major and minor injuries must be made by the club’s medical staff and in accordance with the club’s medical standards.”<sup>116</sup> It is up to the judgment of the club when players are able to return to the field.<sup>117</sup> In the player’s contract with their specific club it is stated that if the player is injured in the course of his employment with the club he “will receive such medical and hospital care during the term of this contract as the [c]lub physician may deem necessary.”<sup>118</sup> The club’s decision to allow a player back onto the field and how to treat their injuries mainly falls into the hands of the team physicians.<sup>119</sup>

Having these team physicians managing injury care creates a conflict of interest, as the physicians are paid by the individual club, even though the physicians’ responsibility is to attend to the best interests of the players.<sup>120</sup> However, the clubs have incentives to keep their best players on the field in order to win games.<sup>121</sup> There is a severe conflict in the obligations club doctors have to the players as part of the doctor-patient relationship and to the clubs who need information regarding the health and the availability of their players for future games.<sup>122</sup> This conflict has not gone unnoticed by the players.<sup>123</sup> The NFLPA conducted a poll in 2013 in which it was found that seventy-eight percent of players do not

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114. See NFL CONST. art. XVII, §16 (displaying in this short section regarding player injuries, that the NFL gives the individual clubs the power to classify players as injured and total responsibility for their care).

115. See *id.* (stating that injury reports detailing the prognosis of a player’s recovery time are to be filled out by the “club physician and countersigned by a working club executive or the head coach”).

116. See *id.*

117. See *id.*

118. See NFL-NFLPA, *supra* note 100, at 338.

119. See NFL CONST. art. XVII, §16.

120. See NFL-NFLPA, *supra* note 100, at 214.

121. See I. Glenn Cohen et al., *A Proposal to Address NFL Club Doctors’ Conflicts of Interest and to Promote Player Trust*, 46 THE HASTINGS CTR. S2, S3 (2016) (stating that players are expected to “sacrifice their health for the game).

122. See *id.* at S3, S5, S9.

123. See *id.* at S7-S8 (displaying attitudes of current and former NFL players); see also Pompei, *supra* note 74 (reporting a former player’s statement that the fact the physicians answer to the team led him to make the decision to undergo two surgeries in the care of independent doctors).

trust their team doctors and medical staff.<sup>124</sup> Additionally, only forty-three percent of players rated their team training staff, that includes their medical staff, as “good.”<sup>125</sup>

This distrust among players of team doctors and medical staff has been highlighted by questionable hiring decisions by teams.<sup>126</sup> Former San Diego Chargers team doctor David Chao “quit” his job in 2013 in order to spend more time with his family.<sup>127</sup> However, an underlying cause of his sudden decision to leave the organization may have been the fact that two San Diego hospitals barred Dr. Chao from performing surgeries there after they conducted reviews of his “quality of care and of his alcohol consumption.”<sup>128</sup> Dr. Chao had also been accused of negligence and maiming patients during surgeries.<sup>129</sup> Following the allegations, the NFLPA called for Chao to resign, stating that “[t]he players of the National Football League deserve to have a doctor that’s not been found liable for malpractice.”<sup>130</sup>

More recently in 2019, while under contract with the Washington Football Team, Pro-Bowler Trent Williams was diagnosed with cancer and underwent surgery to remove a tumor in his skull.<sup>131</sup> Williams stated that the tumor first appeared six years prior while playing for Washington.<sup>132</sup> When Washington examined Williams’ skull, the medical staff diagnosed the tumor as minor and continued to allow him to play.<sup>133</sup> Following the discovery that the tumor was cancerous, Williams shared that the cancer “was only weeks away from spreading to his brain.”<sup>134</sup> When Williams was asked about his feelings regarding his

124. See Marc Sessler, *NFLPA: 78 Percent of Players Don't Trust Team Doctors*, NFL.COM (Jan. 31, 2013, 10:31 AM), <https://www.nfl.com/news/nflpa-78-percent-of-players-don-t-trust-team-doctors-0ap1000000133534>.

125. See *id.*

126. See *infra* notes 127-36.

127. See Brent Schrottenboer, *Hospitals Confirm Chargers Doctor Barred From Surgery*, USA TODAY (June 22, 2013, 2:03 PM), <https://www.usatoday.com/story/sports/nfl/2013/06/19/chargers-doctor-chao-hospitals-barred-surgery/2439715> (reporting that Chao also stated he was stepping down due to personal health problems).

128. See *id.*

129. See *id.*

130. See *NFLPA Wants Chargers Doc Replaced*, ESPN (Jan. 31, 2013), [https://www.espn.com/nfl/story/\\_/id/8903855/nflpa-wants-david-chao-san-diego-chargers-team-doctor-replaced](https://www.espn.com/nfl/story/_/id/8903855/nflpa-wants-david-chao-san-diego-chargers-team-doctor-replaced).

131. Jenna West, *Trent Williams Says He Had Cancer Before His Offseason Surgery*, SPORTS ILLUSTRATED (Oct. 31, 2019), <https://www.si.com/nfl/2019/10/31/trent-williams-cancer-surgery-redskins>.

132. See *id.*

133. See *id.*

134. *Id.*



team, he stated that there was no trust between himself and the organization.<sup>135</sup> In 2020 Williams was given permission for his agent to seek to facilitate a trade to another team.<sup>136</sup>

### E. NFL Medical Care Plans for Current and Retired Players

With the constant threat of injuries and other health issues, the NFL has a comprehensive medical plan for its active players that teams must implement.<sup>137</sup> However, the standards for how the NFL treats its active and former players is very different, with active players receiving a multitude of services from their teams and former players receiving very few.<sup>138</sup> The active players of a team are treated by their club physicians.<sup>139</sup> The Head Team Physician of a club team is charged with overseeing the treatment plan for injured players.<sup>140</sup> Each club is mandated to provide board certified physicians in various specialties such as orthopedics, family medicine, and emergency medicine in order to provide players and their families with access to whatever services they believe would best benefit their health and wellness.<sup>141</sup> Teams also must provide consultants in various areas such as neurology, cardiology, behavioral health, and pain management.<sup>142</sup> There is also assistance available to current players for mental health counseling and substance abuse problems.<sup>143</sup> Though these services are beneficial to current

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135. *Id.* (reporting Williams stated that he was upset regarding how the team handled his medical situation and the long period of time it took for it to be addressed).

136. See Nick Shook, *Niners Acquire Redskins Tackle Trent Williams in Trade*, NFL.COM (Apr. 25, 2020, 5:10 AM), <https://www.nfl.com/news/niners-acquire-redskins-tackle-trent-williams-in-trade-0ap3000001111403>.

137. See generally *Overview of NFL Player Benefits*, NFL PLAYER HEALTH & SAFETY (Apr. 1, 2020, 6:24 AM), <https://www.nfl.com/playerhealthandsafety/resources/for-players-and-former-players/overview-of-nfl-player-benefits> (listing various plans of benefits available to active and former players); see also NFL-NFLPA, *supra* note 100, at 213-14, 231-33 (listing various types of physicians and resources teams must provide to their active players).

138. Compare NFL-NFLPA, *supra* note 100 at 213-14, 231-33 (displaying the access that active players have to a wide range of resources), with *Benefits for Vested Former Players*, NFL PLAYER BENEFITS (Aug. 2020), <https://static.www.nfl.com/image/upload/v1613674163/league/zvha8z8hwj8mbvyprmi.pdf> [hereinafter *Benefits for Vested Former Players*] (showing a short three-page document regarding what benefits vested former NFL players have access to).

139. See NFL-NFLPA, *supra* note 100, at 213-14.

140. See *id.* at 214 (stating that Head Team Physicians have the authority to decide when players need medical care and management).

141. See *id.* at 213-14, 231-33.

142. See *id.* at 213.

143. See *id.* at 232-33.

players, these same services are in many cases not available to retired veterans of the game suffering from the lasting effects of football.<sup>144</sup>

Medical benefits, such as eligibility for long term care plans and disability plans, are separated into active and former players categories.<sup>145</sup> The benefit categories for players are then further divided into vested, non-vested, and practice squad players.<sup>146</sup> Vested players are those that have completed three credited seasons.<sup>147</sup> Vested former players have the most access to the limited benefits the NFL provides for former players' health following retirement.<sup>148</sup> For example, vested former players have access to a long-term care plan that must be applied for at age fifty.<sup>149</sup> If they are approved, they can receive a lifetime maximum benefit of \$219,000.<sup>150</sup> Even though they receive the most access to benefits, vested players and their dependents are only eligible for five years of medical coverage following their retirement.<sup>151</sup> Non-vested players have significantly less access to care than vested players and are not entitled to receive discounted prescription benefits, life insurance, counseling sessions, legal services, spine treatment, neurological treatment, and others.<sup>152</sup> This is problematic as those that do not complete three seasons in the NFL may still suffer from debilitating injuries as a result of playing in the NFL as well as at the collegiate level.<sup>153</sup> The NFL does provide disability benefits for former players, but the NFL's criteria for qualification for these benefits comes with its own challenges.<sup>154</sup>

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144. See NFL PLAYER BENEFITS, *supra* note 138. Vested former players receive only two free visits with a psychiatrist and "preferred access" to treatment providers. *Id.*

145. See NFL PLAYER HEALTH & SAFETY, *supra* note 137 (displaying the different classifications of benefits).

146. *Id.*

147. See *Benefits for Vested Active Players*, NFL PLAYER BENEFITS (Aug. 2020), <https://static.www.nfl.com/image/upload/v1613673951/league/k6mtb60spqbrqkwre6ui.pdf> [hereinafter *Benefits for Vested Active Players*].

148. See *id.* (displaying that certain benefits such as joint replacement benefits are only available to vested former players).

149. See *Benefits for Vested Former Players*, *supra* note 138.

150. See *id.*

151. See *id.*

152. See *Benefits for Vested Active Players*, *supra* note 147 (specifying that these benefits are only available to vested former players).

153. See *Ex-Sooners' QB Says Knees Won't Let Him Play*, ESPN (Aug. 11, 2005), <https://www.espn.com/nfl/news/story?id=2131507>. Former Oklahoma quarterback and Heisman Trophy winner Jason White ended his professional career after less than a season in the NFL citing his weak knees. *Id.* His career at Oklahoma ended with reconstructive surgery on both his knees. *Id.*

154. NFL PLAYER BENEFITS, NFL PLAYER DISABILITY & NEUROCOGNITIVE BENEFIT PLAN 5 (2019), <https://nflpaweb.blob.core.windows.net/website/Departments/Benefits/DisabilitySPD-21.pdf> [hereinafter NFL PLAYER DISABILITY PLAN] (displaying the eligibility requirements that players must meet both medically and administratively in order to qualify for disability benefits under the plan).

The difficulty in obtaining benefits for former NFL players can be seen through the NFL disability benefits.<sup>155</sup> There are three types of benefits laid out in the disability plan: 1) Total and Permanent Disability, 2) Line of Duty Disability, and 3) Neurocognitive Disability.<sup>156</sup> There are significant differences and restrictions regarding the classifications of disability.<sup>157</sup> Line of Duty Disability Benefits last only for a maximum of ninety months while Total and Permanent Disability Benefits are long term.<sup>158</sup> Neurocognitive Disability Benefits are only awarded for players that are not receiving any other form of disability benefits.<sup>159</sup> What the NFL does not acknowledge is how difficult it is for former players to meet the criteria to receive these benefits.<sup>160</sup> The difficulty in obtaining these benefits is a situation that is unique to the NFL, as organizations such as Major League Baseball (hereinafter, “MLB”) offer an extensive pension and health care program for former players.<sup>161</sup> In the MLB, players who spend one day on the active roster are entitled to receive lifetime healthcare.<sup>162</sup> In order to receive these benefits an MLB player does not even need to leave the bench during the game.<sup>163</sup> As a result of the difficulty former NFL players face in attempting to receive benefits for serious injuries in their careers, many players have been forced to turn to litigation for relief.<sup>164</sup>

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155. *See id.*

156. *See id.* at 6.

157. *See id.* at 9, 22, 27.

158. *See id.* at 18, 26.

159. *See id.* at 29.

160. *See id.* at 5 (displaying requirements a player must meet).

161. Brendan Kutty, *The Benefits to Spending Even 1 Day on an MLB Roster*, NJ.COM (Mar. 29, 2019, 5:28 AM), [https://www.nj.com/yankees/2015/07/the\\_benefits\\_to\\_spending\\_even\\_1\\_day\\_on\\_an\\_mlb\\_rost.html](https://www.nj.com/yankees/2015/07/the_benefits_to_spending_even_1_day_on_an_mlb_rost.html) (stating that once an MLB player spends forty-three days on a roster he is entitled to receive pension benefits and improved health care benefits).

162. Kevin Baumer, *MLB Players Earn a Pension After Just 43 Days in the Majors*, BUS. INSIDER (Jan. 26, 2011, 12:07 PM), <https://www.businessinsider.com/nfl-nhl-nba-mlb-retirement-pension-plans-lockout-2011-1> (stating that just one day playing at the major league level qualifies a player in the MLB for lifetime healthcare).

163. *Major League Baseball Pension and Healthcare Benefits*, BRYAN CAVE LEIGHTON PAISNER LLP (Aug. 30, 2011), <https://benefitsclp.com/major-league-baseball-pension-and-healthcare-benefits>.

164. *See infra* Section I.F-G.

### F. Litigation by Former NFL Players Regarding Benefits

The NFL disability plan is governed by ERISA.<sup>165</sup> The NFL Disability Board is the final decisionmaker in whether the former players will receive benefits regarding their disability claims.<sup>166</sup> There are six members of the Board, three who are appointed by the NFL Management Council, which represent the NFL clubs, and three who are appointed by the NFLPA.<sup>167</sup> The Commissioner of the NFL is the chairman of the Disability Board, but does not vote in any of the decisions.<sup>168</sup> Among the voting members of the Board there is no dedicated representation for former players or representatives chosen by retired players.<sup>169</sup> The benefit plan utilizes a point system which allocates points for injuries and medical procedures to determine if a player is eligible for disability benefits.<sup>170</sup> For example, in order for a former player to obtain “Line of Duty Benefits,” he needs to total ten points.<sup>171</sup> The Board has the final say on how many points a former player’s injuries resulting in medical procedures and costs total in order for him to receive benefits.<sup>172</sup>

If the former player is not satisfied with the Board’s decision he can appeal to federal court in accordance with his rights under ERISA.<sup>173</sup> However, the odds of reversal are slim, “[s]ince 1993, the courts have upheld 96 percent of the [Board’s] decisions in lawsuits filed by retired players.”<sup>174</sup> The courts have continued this trend as recently as August 2020 when a federal judge in Texas upheld the decision to deny disability benefits to a former Buffalo Bills and Jacksonville Jaguars defensive back, Ashton Youboty.<sup>175</sup> The Disability Board decided not to count a January 2019 football injury-related surgery toward Youboty’s points total, stating that the procedure occurred after the statute of limitations for

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165. See NFL PLAYER DISABILITY PLAN, *supra* note 154, at 53.

166. See *id.* at 50.

167. See *id.* at 46.

168. See *id.* (stating that the NFL Commissioner is a nonvoting member).

169. See *id.* (detailing that the representatives are chosen by the NFLPA and the NFL Management Council).

170. See generally *id.* at 60-76. Appendix A displays the point system used for orthopedic impairments. *Id.*

171. See *id.* at 22.

172. See *id.* at 46 (stating that the Disability Board “has absolute discretion” to review and interpret disability claims).

173. See *Oversight of the National Football League (NFL) Retirement System: Hearing Before the S. Comm. on Com., Sci., and Transp.*, 110th Cong. 44 (2007).

174. *Id.* at 49.

175. See Katie Buehler, *Texas Judge Laments Dismissal of Ex-NFLer’s ERISA Suit*, LAW 360 (Aug. 18, 2020, 5:23 PM), <https://www.law360.com/benefits/articles/1302266/texas-judge-laments-dismissal-of-ex-nfler-s-erisa-suit>.

plan eligibility had expired.<sup>176</sup> If the Board had allowed this surgery to count, benefits would have been awarded.<sup>177</sup> The judge stated that although he “might not have reached the same conclusion as the Board,” the denial was a use of the Board’s broad discretion.<sup>178</sup> The judge indicated that in order for a decision not to award benefits to be reversed, the Board would have to have abused its discretion when deciding not to award benefits.<sup>179</sup> As a result of the broad discretion the Board holds, the high bar for a finding an abuse of discretion will continue to be a barrier in many cases regarding denial of benefits.<sup>180</sup>

Former players have also attempted to reverse the Disability Board’s decisions by pointing to a potential conflict of interest between the Board members that are appointed by the NFL owners and the disability plans they are tasked with overseeing.<sup>181</sup> It has been asserted that because the NFL historically denied a connection between the game of football and permanent brain injuries that cause players to require disability payments, there is an incentive for the NFL representatives appointed to the Board to deny benefits.<sup>182</sup> This sentiment is especially apparent in the case of players that suffer from head injuries.<sup>183</sup> In *Boyd v. Bell*, the Plaintiff, Brent Boyd, attempted to assert a claim for relief based on the conflict of interest inherent in the Board’s composition.<sup>184</sup> Boyd was an offensive lineman from 1980 to 1986 with the Minnesota Vikings.<sup>185</sup> Boyd claimed that, during a game in 1980, he was knocked unconscious from a blow to the head and was never sent for further evaluation.<sup>186</sup> Boyd alleged that, following the injury, he experienced memory loss and headaches.<sup>187</sup>

The Board denied his request for an extension of his disability benefits, and Boyd alleged that it was partly a result of the inherent conflict of interest within the composition of the board and the desire to

176. *See id.* (stating that Youboty alleged he had nineteen points worth of impairments but the board decided he had an eight-point score).

177. *See* *Youboty v. NFL Player Disability & Neurocognitive Benefit Plan*, No. 4:19-CV-2306, 2020 WL 5628020, at \*1 (S.D. Tex. Aug. 17, 2020).

178. *See id.* at \*7.

179. *See id.*

180. *See generally* NFL PLAYER DISABILITY PLAN, *supra* note 154, at 46, 51-53 (detailing the broad discretion the board has and the process used to review disability claims).

181. *See* *Boyd v. Bell*, 796 F. Supp. 2d 682, 690 (D. Md. 2011).

182. *See id.*

183. *See id.*

184. *See id.*

185. *See id.* at 686.

186. *See id.* (stating that the Minnesota Vikings also declined his request for a brain scan in his exit physical).

187. *Id.*

minimize the link between head injuries and football.<sup>188</sup> However, the Supreme Court has only found a conflict of interest to exist when the “same entity that pays benefits also administers the plan, giving the administrator ‘a direct financial stake in eligibility determinations.’”<sup>189</sup> The judge stated that he was persuaded by other decisions in his district to hold that the Board was not conflicted as a result of the composition.<sup>190</sup> It was also noted by the court that only three of the votes were contested as conflicted, and a majority is needed for the benefit determinations.<sup>191</sup> Therefore, a conflict could not be imported to the entire Board.<sup>192</sup> As a result of many instances of unsuccessful litigation, many players have settled with the NFL for injuries suffered in their careers.<sup>193</sup>

### G. The NFL Concussion Settlement

In April 2015, a class action suit of over five thousand former NFL players and their estates sued the NFL, alleging claims of fraud and negligence.<sup>194</sup> The underlying basis for the allegations of the plaintiffs in the class action was that for years, the NFL had “disseminated ‘junk science’ denying the link between head injuries and cognitive disorders.”<sup>195</sup> The former players alleged that the NFL failed to take reasonable actions to protect them from chronic risk created by head injuries and concussions during their careers by suppressing information concerning the link between football and brain injuries.<sup>196</sup> The former players sought damages, declaratory relief, and medical monitoring.<sup>197</sup> The NFL chose to settle this case, meaning that there would be no

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188. *See id.* at 690.

189. *Id.*

190. *See id.* at 690-91.

191. *See id.* at 691.

192. *See id.*

193. *See infra* Section I.G.

194. *See In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 422 (3d Cir. 2016) (detailing that other claims asserted by the class included fraudulent concealment, negligent misrepresentation, and negligent hiring).

195. *See id.*

196. *See id.* (alleging that the NFL “ignored, minimized, or outright suppressed information” concerning the link between head trauma and cognitive damage).

197. *See generally In re Nat'l Football League Players' Concussion Injury Litig.*, 307 F.R.D. 351, 362 (E.D. Pa. 2015), *amended sub nom. In re Nat'l Football League Players' Concussion Injury Litig.*, No. 2:12-MD-02323-AB, 2015 WL 12827803 (E.D. Pa. May 8, 2015), and *aff'd sub nom. In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410 (3d Cir. 2016), as amended (May 2, 2016).

disclosure of whether the NFL truly had knowledge of the link between football and brain injuries as a result of repeated concussions.<sup>198</sup>

One of the main conditions of the settlement was that the agreement denied any wrongdoing on the part of the NFL and that the settlement cannot be used as proof of wrongdoing in subsequent suits brought against the NFL.<sup>199</sup> The final settlement document stated that:

[T]his Final Order and Judgment related documents and any actions taken by the NFL Parties or the Released Parties in the negotiation, execution, or satisfaction of the Settlement Agreement: (a) do not and shall not, in any event, constitute, or be construction as, an admission of any liability or wrongdoing, or recognition of the validity of any claim made by the [c]lass.<sup>200</sup>

In total, the settlement plan will cost the NFL about one billion dollars.<sup>201</sup> The average one-time payout for an NFL player suffering from covered injuries in the settlement such as CTE, Alzheimer's disease, or ALS, also called Lou Gehrig's disease, will be about \$190,000.<sup>202</sup>

Though this suit will provide some relief for players and their families who are suffering and need immediate financial relief, one of the main criticisms of the settlement is that it does not cover any future cases regarding brain conditions like CTE and that it is only a one-time payment to suffering players.<sup>203</sup> Additionally, the settlement only covers players diagnosed with CTE or other neurological problems before July 7, 2014.<sup>204</sup> Attorneys for former players in the settlement publicly referred to the settlement as a "sell out ... designed to dramatically reduce the

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198. See Tribune News Services, *Supreme Court Leaves \$1B NFL Concussion Settlement in Place*, CHICAGO TRIB. (Dec. 12, 2016, 10:48 AM), <https://www.chicagotribune.com/sports/ct-nfl-concussion-settlement-supreme-court-20161212-story.html>.

199. See generally *In re Nat'l Football League Players' Concussion Injury Litig.*, 307 F.R.D. 351, 425-26 (E.D. Pa. 2015), amended *sub nom. In re Nat'l Football League Players' Concussion Injury Litig.*, No. 2:12-MD-02323-AB, 2015 WL 12827803 (E.D. Pa. May 8, 2015), and *aff'd sub nom. In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410 (3d Cir. 2016), as amended (May 2, 2016) (stating that the settlement cannot be used as evidence in any other litigation concerning the NFL and brain injuries).

200. See *id.*

201. See Tribune News Services, *supra* note 198.

202. See *id.*

203. See Mark Fainaru-Wada & Steve Fainaru, *Duerson Family Objects to Settlement*, ESPN (Oct. 14, 2014), [https://www.espn.com/espn/otl/story/\\_/id/11702872/dave-duerson-family-files-objection-nfl-concussion-settlement](https://www.espn.com/espn/otl/story/_/id/11702872/dave-duerson-family-files-objection-nfl-concussion-settlement).

204. See *Frequently Asked Questions*, NFL CONCUSSION SETTLEMENT, <https://www.nflconcussionsettlement.com/FAQDetails.aspx?q=154#154> (last visited Feb. 7, 2021). Listed under question three: "Who is included in the Settlement Class?" *Id.*

number of claims on which the NFL must pay.”<sup>205</sup> Additionally, the settlement bars any further recovery for any player under the terms of the settlement who did not “opt out” of the settlement agreement.<sup>206</sup> The deadline to opt out of the settlement was October 14, 2014.<sup>207</sup> If a player did not choose to opt out, their chance to object to the agreement has passed and the player is bound by the terms of the settlement.<sup>208</sup> As a result, the NFL’s concussion settlement is not a viable solution for many retired players.<sup>209</sup>

## II. ISSUE

The current allocation of injury care to the player’s club team by the NFL Constitution and the CBA rather than to the NFL has made litigation for compensation for injuries or medical benefits extremely difficult for former players and their estates.<sup>210</sup> The current classification relieves the NFL from much responsibility regarding player care and treatment of injuries, leaving the decisions up to the individual club, which leads to disparity in the care that players receive.<sup>211</sup> This has allowed the NFL to remove itself from liability and accountability regarding player injuries and conditions such as CTE.<sup>212</sup> Additionally, the current classification has made it extremely difficult for players to succeed in claims against the NFL.<sup>213</sup> This has been displayed through the NFL concussion settlement, in which the NFL did not take any responsibility for debilitating injuries suffered by former players.<sup>214</sup> This section will address the responsibilities that the NFL has already taken on regarding player health and care through the NFL Constitution, the CBA, and most recently

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205. See Fainaru-Wada & Fainaru, *supra* note 203.

206. See NFL CONCUSSION SETTLEMENT, *supra* note 204.

207. See *id.*

208. See *id.*

209. See generally *id.* (displaying that the qualifications to receive from the settlement limit the amount of players that can benefit from the terms of the settlement).

210. See generally Cy Smith, *Stop Fighting NFL Retirees’ Claims*, ESPN (Aug. 29, 2011), [https://www.espn.com/espn/commentary/story/\\_/id/6906658/retired-nfl-players-sue-get-injury-benefits](https://www.espn.com/espn/commentary/story/_/id/6906658/retired-nfl-players-sue-get-injury-benefits) (stating that it is difficult for retired players to receive benefits without bringing a lawsuit against the NFL which has a slim chance of success).

211. See NFL CONST. art. XVII, §16.

212. See *supra* Section I.G.

213. See generally NFL PLAYER DISABILITY PLAN, *supra* note 154, at 49-53 (outlining the broad discretion that the board has when awarding benefits); *Oversight of the National Football League (NFL) Retirement System*, *supra* note 173, at 49 (stating that in ninety-six percent of cases brought by former NFL players, the courts have kept the judgment of the board in place).

214. See *supra* Section I.G.



through the Coronavirus pandemic.<sup>215</sup> It will then address how some of the responsibilities taken on by the NFL mirror that of an employer-employee relationship, which could set the precedent for further delegation of responsibility to the NFL for injury care.<sup>216</sup> Finally, this section will address the criteria necessary to be considered a fiduciary under ERISA and what a fiduciary owes to its beneficiaries.<sup>217</sup>

#### A. *Current Role of the NFL in Overseeing Injury Care in the CBA*

A large part of the CBA is dedicated to NFL players' rights to medical care and treatment.<sup>218</sup> The section regarding injury care focuses mainly on the team's responsibility for injury care of its players.<sup>219</sup> It details the necessary credentials that each medical provider must possess and the authority that they have over player care and treatment.<sup>220</sup> However, even though the individual teams are tasked with the role of injury care, the NFL has considerable supervisory power regarding the regulation of player health and safety.<sup>221</sup> As listed in the CBA, the NFL has nine health and safety committees which include the Accountability and Care Committee; the NFL Health and Safety Executive Committee; the General Medical Committee; the Head, Neck and Spine Committee; the Pain Management Committee; the Comprehensive Mental Health and Wellness Committee; the Field Surface Safety & Performance Committee; and the Engineering and Equipment Safety Committee.<sup>222</sup>

The Accountability and Care Committee highlights the amount of oversight the NFL has regarding player injuries without having to take direct responsibility for player care.<sup>223</sup> The Accountability and Care Committee consists of both the NFL Commissioner, the NFLPA Executive Director, and three additional members with a background in

215. *See infra* Section II.A-B.

216. *See infra* Section II.C.

217. *See infra* Section II.D.

218. *See generally* NFL-NFLPA, *supra* note 100, at 213-40. Article 39 of the CBA details the rights of players to medical care and treatment for injuries to current NFL players. *Id.* The various committees and standards for player health and safety are discussed. *See id.*

219. *See generally id.* at 214-17 (detailing the types of physicians and consultants clubs must employ in order to be in compliance with the CBA).

220. *See id.* at 213-15.

221. *See id.* at 215 (stating that the NFL's Chief Medical Officer can act without the involvement or consent of the NFLPA Medical Director).

222. *See id.*

223. *See generally id.* at 217-19 (noting the Accountability and Care Committee is a joint NFL and NFLPA committee focusing on the care players receive from their clubs).

health care for professional athletes.<sup>224</sup> The Committee is charged with responsibilities such as (1) developing joint position statements on health and safety issues like CTE and concussions, (2) assisting “in the development and maintenance of injury surveillance and medical records systems,” and (3) creating a standardized preseason and postseason physical examination in order to inform players of the risks associated with playing in the NFL and alert them of the role of the team’s medical staff in preventing and treating injuries.<sup>225</sup> Additionally, the Committee is tasked with conducting an “annual comprehensive review of [c]lub rehabilitation equipment, facilities and modalities, and thereafter establish and implement minimum standards concerning these areas.”<sup>226</sup>

The NFL Head, Neck, and Spine Committee also displays the high level of interaction between the teams and the NFL.<sup>227</sup> The Concussion Protocol was developed by the NFL Head, Neck, and Spine Committee and is implemented by both NFL and the NFLPA.<sup>228</sup> The Concussion Protocol is used by the teams to diagnose and treat potential concussions.<sup>229</sup> Both the NFL Management Council and the NFLPA oversee the enforcement of this mandatory protocol and possess the authority to discipline teams for failing to comply.<sup>230</sup> Even though the NFL is involved in the management, enforcement, and creation of the Concussion Protocol, the decision to clear a player to participate again is still placed in the hands of the team.<sup>231</sup> The Protocol states that a player shall not return until “the Checklist has been completed and the player has been cleared by the [c]lub physician.”<sup>232</sup>

The Health and Safety Committees detailed in the CBA display the amount of control the NFL has over players and certain aspects of their medical care.<sup>233</sup> However, the NFL still chooses to delegate the day-to-day care of serious injuries such as concussions to thirty-two different

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224. *See id.* at 218.

225. *See id.* at 217-19 (displaying responsibilities that are shared by the committee which consists of both members of the NFL and the NFLPA).

226. *See id.* at 218 (stating the responsibilities the Committee has regarding the club facilities).

227. *See id.* at 224-25.

228. *See id.* at 225.

229. *See id.* at 225-26 (detailing that the Concussion Protocol is mandatory for teams to comply with and agreed upon by both the NFL and NFLPA).

230. *See generally id.* at 225-28 (stating the criteria for enforcement of the protocol and the different types of discipline possible for a club team that does not comply).

231. *See id.* at 225.

232. *See id.*

233. *See supra* Section II.A.

organizations.<sup>234</sup> The NFL's continued involvement regarding health and safety of players in collaboration with the NFLPA may lead to NFL liability for injuries suffered by players as the NFL continues to look and act more like an employer of the players.<sup>235</sup>

### B. Other Forms of NFL Control Over Players

In addition to injury care, the NFL possesses a considerable level of control over other activities of its players.<sup>236</sup> For example, when players sign their contracts with their club, they grant both the club and the NFL, "separately and together," the right to use a player's likeness, picture, or photograph in order to promote the NFL.<sup>237</sup> Further, in their contract it is stated that players "will cooperate with the news media, and will participate upon request in reasonable activities to promote the Club and the League."<sup>238</sup> The relationship between the NFL and its member clubs is referred to as a "joint venture" in the contract between the two entities.<sup>239</sup> The control the NFL exerts over media and marketing of players in conjunction with the individual clubs displays that the NFL does have the capacity and ability to integrate its policies with that of the teams.<sup>240</sup> This further sets precedent for more integration surrounding player health and safety.<sup>241</sup>

In addition, the recent Coronavirus pandemic (hereinafter "COVID-19") has highlighted the amount of regulatory control the NFL exerts over both players and teams.<sup>242</sup> Prior to the start of the 2020 season, the NFL and NFLPA released a joint COVID-19 Protocol document detailing the requirements and expectations for teams and players throughout the

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234. See NFL-NFLPA, *supra* note 100, at 214 (stating that Head Team Physicians of each team have the authority to decide when players need medical care and management).

235. See *infra* Section II.B-C.

236. See generally NFL-NFLPA, *supra* note 100 (listing in the table of contents all the areas in which the NFL exercises control over football players employed by member clubs through the terms of the collective bargaining agreement).

237. See *id.* at 334-35. Publicity and NFLPA Group Licensing Program section details that when signing a contract, the player allows both the club and the NFL to use their likeness to promote football, charity initiatives, and other official NFL events. See *id.*

238. See *id.* at 335.

239. See *id.* at 339.

240. See *id.* at 334-36.

241. See *infra* Section III.A.

242. See generally NFL-NFLPA COVID-19 PROTOCOLS FOR 2020 SEASON, NFL & NFLPA (Oct. 16, 2020), <https://static.www.nfl.com/image/upload/v1604923568/league/qj8bnhpzrnjevze2pmc9.pdf> (showing the various COVID-19 protocols that were put in place for the NFL).

season.<sup>243</sup> The protocol stated that the education and standards set and presented to players in the COVID-19 Protocol “was jointly-developed by the NFL and the NFLPA.”<sup>244</sup> The collaborative nature of this COVID-19 Protocol shows that the NFL has taken more control regarding player health and safety.<sup>245</sup> The screening and testing protocol prior to the start of the season was referred to as the “NFL’s return to work plan” and continues to be monitored by both the NFL and the NFLPA.<sup>246</sup>

The testing mechanisms for COVID-19 required by the protocol and implemented by teams were required to be approved by both the NFL and the NFLPA in order to be in compliance with the NFL standards.<sup>247</sup> Additionally, prior to their first game teams were required to submit an Infectious Disease Emergency Response Plan which would detail the team’s plan for “mitigating risk” of a COVID-19 outbreak.<sup>248</sup> Each team’s plans were reviewed by both the NFL and NFLPA to ensure they met the standards of the COVID-19 protocol.<sup>249</sup> Further, the protocol also states that when a player tests positive or experiences symptoms consistent with COVID-19, the club must notify the NFL Chief Medical Officer.<sup>250</sup> The protocol states that “[the club] must notify the NFL Chief Medical Officer of confirmed or suspected (i.e., based on symptoms) cases of COVID-19 as soon as possible.”<sup>251</sup> The club must also provide additional information to the NFL such as the date of the positive test, the method of detection, facility access the person had, and the people the infected person was in contact with.<sup>252</sup> In order for a player to return to the club facility, the team physician must approve the return and the NFL

243. *See id.* at 1 (stating that the NFL and NFLPA developed the COVID-19 Protocol that clubs must use throughout the season).

244. *See id.* at 3.

245. *See id.* at 1 (stating that the NFL and the NFLPA with their “respective infectious disease experts have developed material that Club medical staffs must use” when educating their employees about COVID-19).

246. *See id.* at 58 (referring to the testing protocol as the NFL’s return to work plan and additionally refers to the entire NFL-NFLPA Screening and Testing Protocol).

247. *See id.* at 59 (stating that “all testing required by this Protocol must be mutually approved by the NFL and NFLPA and FDA approved”).

248. *See id.* at 45. The plan must detail the way teams will implement safety measures to reduce the risk of infections, how testing will be conducted, and treatment if a player tests positive. *See id.* at 5 (stating that the Infectious Disease Emergency Response Plan is subject to review and approval by the NFL, NFLPA, and Infection Control for Sports).

249. *See id.*

250. *See id.* at 25.

251. *Id.*

252. *See id.* (displaying a list of information that must be provided to the NFL when a player or person within the organization tests positive for COVID-19).

Chief Medical Officer has to be notified regarding the return.<sup>253</sup> These newly implemented procedures highlight the involvement of the NFL in the health and safety of players regarding the COVID-19 pandemic.<sup>254</sup> This increased level of involvement by the league could set the precedent for an allocation of injury care to the NFL through a renegotiation of the CBA or sooner as the COVID-19 protocol has shown that it is possible to provide new regulations without a total renegotiation.<sup>255</sup>

### C. *Criteria for Classification as an Employee*

Though the NFL does not consider its players to be employees of the NFL, the control exerted by the NFL over players in certain areas regarding health, safety, and publicity is similar to that of an employer.<sup>256</sup> The Supreme Court has established a multifactor test to determine if a person is considered to be an “employee.”<sup>257</sup> The Court has acknowledged that this test is not an exhaustive list of factors, but that the relationship must be assessed “with no one factor being decisive.”<sup>258</sup> This test has been used to determine who qualifies as an “employee” under a common-law understanding:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.<sup>259</sup>

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253. See *id.* at 37 (showing a flow chart displaying the necessary steps a team must take once an individual within the club tests positive for COVID-19).

254. See *id.* at 24-35 (displaying the NFL’s involvement in the treatment response protocol).

255. See generally *id.* at 1-4, 24-35 (displaying the multitude of regulations the NFL-NFLPA COVID-19 Protocol implemented without referencing the CBA).

256. See *supra* Section II.A-B.

257. See *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989).

258. See *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968) (stating that there is “no shorthand formula or magic phrase that can be applied to find the answer”).

259. See *Cnty. for Creative Non-Violence*, 490 U.S. at 751-52.

Other considerations regarding if a person is an employee are; (1) whether the person does business in the name of the company; (2) whether the person receives benefits of a group insurance or pension fund; or (3) or if they perform functions that are essential to the company's operations.<sup>260</sup>

Though the NFL does not have responsibility for the salary of players, it has many other responsibilities similar to that of an employer, which emphasizes the amount of control the NFL has voluntarily asserted over players.<sup>261</sup> Players do business in the name of the NFL and publicly represent the NFL.<sup>262</sup> The NFL also exerts control over how long players work, as the NFL and NFLPA decide on the length of the season.<sup>263</sup> Additionally, the increased control by the NFL over player health and safety during games through the "Play Smart Play Safe" initiative does have an effect on how football is played, as certain types of tackles and blocks are no longer allowed.<sup>264</sup> Further, as seen recently through the procedures put in place regarding the COVID-19 pandemic, the NFL oversees much of the protocol implemented by teams and is alerted every time a player might possibly have the virus.<sup>265</sup> These examples of extensive NFL control over its players display that the NFL exerts control over its players similar to that of an employer over an employee.<sup>266</sup> Therefore, the NFL has the ability to create and enforce policies to better protect its players.<sup>267</sup>

In both the player contracts and the most recent CBA, it can be shown that the NFL enforces and has created many regulatory programs to aid in player health and safety.<sup>268</sup> However, the NFL still leaves the implementation of the health care aspects of these programs up to teams, placing the health and wellness of the players in the hands of thirty-two

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260. See *United Ins. Co. of Am.*, 390 U.S. at 259 (listing a variety of factors that could inform the existence of an employer-employee relationship).

261. See NFL-NFLPA, *supra* note 100, at 337-38 (displaying sample player contract which states "Club will pay Player a yearly salary").

262. See *id.* at 334-35.

263. See *id.* at 191 (stating that the NFL "and/or" the teams have discretion regarding the number of games played).

264. See PLAY SMART PLAY SAFE, HOW THE NFL IS ADVANCING PLAYER HEALTH AND SAFETY 1 (May 2018), <https://nflps.org/wp-content/uploads/2018/09/NFL-Fact-Sheet-Health-and-Safety-9.2018-1.pdf>.

265. See NFL & NFLPA, *supra* note 242, at 25.

266. See *supra* Section II.A-B.

267. See *supra* Section II.B.

268. See *supra* Section II.A.

separately run organizations.<sup>269</sup> Even though a change to classify players as employees is unlikely due to the considerable amount of liability the NFL would incur for off the field behavior, it is important to acknowledge the amount of control the NFL has over its players.<sup>270</sup> The NFL's control over its current players also extends to its retired players through the implementation of its disability plan.<sup>271</sup>

#### *D. Fiduciary Responsibilities Under ERISA*

The NFL's disability benefit plans are governed by ERISA.<sup>272</sup> In the NFL's Disability and Neurocognitive Disability Plan, it refers to those who are responsible for the operation of the Disability Plan as fiduciaries.<sup>273</sup> Under ERISA, an entity is a fiduciary if there is a voluntary assumption of that status or when there is express designation by ERISA.<sup>274</sup> It is established that a person is fiduciary if:

(i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.<sup>275</sup>

Based on the above standard and its own admission in its disability plan, the NFL has a fiduciary duty regarding the implementation and monitoring of the benefit plans for retired NFL players.<sup>276</sup> The NFL exercises control regarding the standards players must meet in order to receive benefits and also appoints members to the disability board in order

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269. See NFL CONST. art. XVII, §16 (stating that clubs have the power to classify players as injured and retain total responsibility for their care).

270. See *supra* Section II.A.

271. See *infra* Section II.D.

272. See NFL PLAYER DISABILITY PLAN, *supra* note 154, at 53.

273. See *id.*

274. See *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 284 F. Supp. 2d 511, 543 (S.D. Tex. 2003).

275. 29 U.S.C. § 1002(21)(A).

276. See NFL PLAYER DISABILITY PLAN, *supra* note 154, at 53 (referring to the NFL as fiduciaries).

to decide which former players are entitled to benefits for injuries suffered.<sup>277</sup>

As a result of its classification as a fiduciary of the disability plan, the NFL is expected to comply with certain fiduciary duties to the plan's beneficiaries.<sup>278</sup> It has been stated that the most fundamental duty of ERISA plan fiduciaries is "a duty of complete loyalty."<sup>279</sup> It is expected that fiduciaries discharge their responsibilities exclusively for the purpose of "providing benefits to participants and their beneficiaries."<sup>280</sup> There should be no outside influences from third parties regarding the implementation of the plan.<sup>281</sup> Additionally, a fiduciary is expected to avoid conflicts of interest in the implementation of the plan.<sup>282</sup> A conflict of interest can occur when the employer is the entity that administers the plan and also pays the benefits required by the plan.<sup>283</sup> Both the teams and the NFL use their revenue in order to pay out disability claims.<sup>284</sup> Therefore, it can be asserted that the NFL is breaching its duty of loyalty, a fundamental aspect of its fiduciary duty, in the implementation of its pension plan.<sup>285</sup>

The classification of the NFL as a fiduciary of its pension plans may be a trigger for ERISA claims from former players as the inherent conflict of interest present interferes with the fundamental duty of loyalty to the plan's beneficiaries.<sup>286</sup> Due to the potential for these claims, the CBA should be renegotiated to limit the disability board's discretion and provide clear standards regarding point allocation for injuries.<sup>287</sup>

### III. RESOLUTION

The best way for the NFL to promote the health and safety of its current players is a renegotiation of the CBA by the NFL and NFLPA

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277. *See id.*

278. *See id.*

279. *See In re Enron Corp. Sec.*, 284 F. Supp. 2d at 546-47.

280. *See id.* at 547.

281. *See id.* at 546-47.

282. *See id.* at 547.

283. *See Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 108 (2008).

284. *See NFL CONST. 1977 & 1978 Res.* (2006) (stating that the NFL is authorized to receive network revenues and postseason game proceeds as an agent for the member clubs to make payments to the Player Retirement Plan and Player Insurance Trust).

285. *See In re Enron Corp. Sec., Derivative & ERISA Litig.*, 284 F. Supp. 2d at 546-47 (S.D. Tex. 2003) (stating that part of the duty of loyalty is an obligation to avoid conflicts of interest).

286. *See id.*

287. *See infra* Section III.B.



allocating treatment for injuries to the NFL.<sup>288</sup> By allocating responsibility for injury care to the NFL, a single standard of care would be created which would prevent disparities present among the medical care provided by the various teams.<sup>289</sup> Regarding retired players, a renegotiation of the CBA in which the composition of the disability board is changed and clear standards for achieving relief for injuries are put in place would greatly aid players in achieving relief for injuries.<sup>290</sup> This section will evaluate the CBA as a mechanism for providing positive change for the current players regarding injury care and former players in receiving relief for injuries suffered as a result of their NFL careers.<sup>291</sup>

*A. Renegotiation of the CBA and Allocation of Injury Care to the NFL*

The CBA was renegotiated in March 2020 and is not up for renegotiation until 2030.<sup>292</sup> However, the 2020 CBA can be seen as laying the groundwork for more regulation of injuries by the NFL of its current players.<sup>293</sup> Committees such as the Accountability and Care Committee and the NFL Head, Neck, and Spine Committee highlight NFL involvement in the health and safety of its players through the CBA.<sup>294</sup> These committees show that the NFL has selectively chosen when it wants to regulate player health and safety while still giving direct responsibility to the teams.<sup>295</sup> The current allocation of injury care is detrimental to the players, as physicians that treat the players are hired by and paid by the individual clubs.<sup>296</sup>

As a result of the extensive involvement by the NFL already present in the CBA and the NFL Constitution over players it is clear that the NFL has the capability to exert control over the medical treatment of players.<sup>297</sup> The CBA already sets standards for the amount of physicians and medical staff each team must have and the qualifications necessary for

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288. *See infra* Section III.A.

289. *See* NFL CONST. art. XVII, §16 (stating that medical care is provided by the thirty-two individual teams).

290. *See infra* Section III.B.

291. *See infra* Section III.A-B.

292. *See* NFL-NFLPA, *supra* note 100, at 1 (stating that the CBA runs through 2030).

293. *See generally id.* at 215-41 (discussing the various committees created by the NFLPA and NFL regarding player health and safety).

294. *See id.* at 217-19, 224-28.

295. *See id.* at 214 (stating that Head Team Physicians have the authority to decide when players need medical care and management).

296. *See id.* (stating that the club remains responsible for services rendered by team physicians).

297. *See* NFL-NFLPA, *supra* note 100, at 214.

employment.<sup>298</sup> Additionally, the NFL has implemented independent neurotrauma consultants for games in order to help treat and spot potential concussions, setting a precedent for further use of independent physicians.<sup>299</sup> Therefore, it would be possible for the NFL to implement independent Head Team Physicians for each team that would clear players to return to play, rather than relying on the Head Team Physicians paid by the team to make these important decisions.<sup>300</sup>

Sports with extreme physical contact, such as boxing, have implemented independent ringside physicians, rather than letting competitors provide their own doctors.<sup>301</sup> In order for a physician to oversee a match, they must pass an exam in order to receive certification from the Association for Ringside Physicians.<sup>302</sup> These specially certified and independent physicians oversee the care of the boxers before, during, and after the boxing event.<sup>303</sup> Unlike the NFL, the physicians have no continuing relationship with athletes after the match and have no financial or personal relationship with the boxer's team.<sup>304</sup> In regards to the NFL, having independent, NFL-specific, trained team physicians would increase the trust that players have in their medical staff and in turn might lead to more players being honest about their injuries and trusting the advice of the physicians.

The recent extensive involvement of the NFL and NFLPA regarding COVID-19 guidelines could provide precedent for collaboration regarding health and safety prior to the actual date of the expected 2030 CBA renegotiation.<sup>305</sup> The new COVID-19 protocols show that the NFL has the capacity to assert regulatory control over the health of its players.<sup>306</sup> These protocols display a willingness on behalf of the NFL to regulate the activities of the individual clubs, as the protocol calls for the NFL to approve COVID-19 requirements and plans put in place by each

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298. *See id.* at 213-15 (describing the qualifications necessary for physicians and athletic trainers).

299. *See id.* at 225-26 (stating that the Concussion Protocol is a joint venture between the NFL and NFLPA and is enforced by both the NFL and NFLPA).

300. *See id.*

301. *See* N.Y. COMP. CODES R. & REGS. tit. 19, § 208.5-8 (2016).

302. *See About Us*, ASS'N OF RINGSIDE PHYSICIANS, <https://ringsidearp.org/about-us/> (last visited Apr. 22, 2022).

303. *See* N.Y. COMP. CODES R. & REGS. tit. 19, § 208.6(a) (2016).

304. *See* N.Y. COMP. CODES R. & REGS. tit. 19, § 208.5-8 (2016).

305. *See* NFL-NFLPA, *supra* note 100, at 1 (stating that the CBA runs through 2030).

306. *See supra* Section II.B.

individual team.<sup>307</sup> The new COVID-19 protocol also displays the ability of the NFL and the NFLPA to agree to implement significant changes to the functioning of the league without renegotiating the CBA.<sup>308</sup> The continuing detrimental effects of the NFL's failure to provide adequate prevention of injuries, specifically concussions, are a threat to player health and safety and should be considered serious enough to warrant collaboration between the NFL and NFLPA prior to the 2030 CBA negotiations.<sup>309</sup>

Delegating injury care responsibilities to the NFL rather than the individual teams would also incentivize the NFL to prioritize player health and safety. In previous litigation by players and their families, the NFL has elected to settle the cases and assert that the settlement is not an admission of liability or wrongdoing on the part of the NFL.<sup>310</sup> Therefore, the NFL has been able to escape any liability for injuries suffered by players by placing the main aspects of injury care in the hands of the individual teams and their team physicians.<sup>311</sup> If the NFL were given more responsibility regarding a player's return to the field following an injury, they would no longer be able to avoid liability in lawsuits brought by injured players.<sup>312</sup> The threat of increased lawsuits by players against the NFL would lead to more stringent protocol regarding player injuries and when these players are cleared to play again.

### *B. Renegotiation of the CBA to Benefit Retired Players*

The results of the NFL's Concussion Settlement and CBA display the struggles that retired players and their families face in attempting to receive compensation for injuries as a result of a career in football.<sup>313</sup> The

307. See NFL & NFLPA, *supra* note 242, at 24-26 (stating that each club's Infectious Disease Emergency Response Plan was subject to approval by the NFL and listing the protocol that must be followed).

308. The NFL and NFLPA's COVID-19 protocol was first enacted on October 16, 2020 and has been updated throughout the season. See generally NFL-NFLPA, *supra* note 242 (stating "the parties will continue to update this Protocol as circumstances warrant and as the science evolves"); see also Judy Battista, *All NFL Teams to Operate in COVID-19 Intensive Protocol Starting Saturday*, NFL.COM (Nov. 18, 2020, 3:12 PM), <https://www.nfl.com/news/all-nfl-teams-to-operate-in-covid-19-intensive-protocol-starting-saturday> (stating that due to the rising COVID-19 infection rates the intensive protocol will be enacted resulting in more stringent requirements for players and coaches).

309. See generally NFL & NFLPA, *supra* note 242, at 1 (displaying that COVID-19 presented a serious health and safety risk that warranted collaboration prior to the CBA renegotiation).

310. See *supra* Section I.G.

311. See NFL CONST. art. XVII, §16.

312. See *supra* Section I.G.

313. See Fainaru-Wada & Fainaru, *supra* note 203; see also Smith, *supra* note 210.

NFL's Concussion Settlement requires a player to have opted in to the settlement and provides no path to relief for players diagnosed with CTE after July 2014.<sup>314</sup> In order for these players to achieve financial relief for injuries, they need to rely on the disability board to award them benefits.<sup>315</sup> The CBA states that "disagreements relating to eligibility for pension, disability, or other benefits under the . . . Disability Plan will be resolved in accordance with the procedures that have been previously adopted by the Members of the [Disability] Board."<sup>316</sup> This is detrimental to the players as the Board possesses broad and absolute discretion in deciding whether or not to award benefits to former players.<sup>317</sup> The point system used by the Board is not uniformly applied, as there are few guidelines that the Board must follow regarding what surgeries and procedures count for a determination that results in benefits.<sup>318</sup> Further, if denied benefits by the Board it is extremely difficult for players to litigate to achieve benefits as courts have largely deferred to the broad discretion allowed in the Board's decisions.<sup>319</sup>

Asserting that the NFL has breached its duty of loyalty to its beneficiaries under ERISA may be a way to open the NFL to liability regarding breach of fiduciary duty claims. A fiduciary is expected to have no outside influences from third parties in the implementation of the plan.<sup>320</sup> The extensive involvement by the NFL in the application of the disability plan shows that there is a significant risk of a breach of the duty of loyalty.<sup>321</sup> An important aspect of the duty of loyalty as a fiduciary is the expectation that the fiduciary avoids conflicts of interest when implementing the plan.<sup>322</sup> The disability board that the NFL has tasked with administering the disability plan can be seen as breaching the duty of loyalty to beneficiaries as a result of the conflict of interest present due

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314. See NFL CONCUSSION SETTLEMENT, *supra* note 204.

315. See NFL PLAYER DISABILITY PLAN, *supra* note 154, at 46 (stating that the disability board has absolute discretion).

316. See NFL-NFLPA, *supra* note 100, at 327.

317. See NFL PLAYER DISABILITY PLAN, *supra* note 154, at 46.

318. See *id.* at 51-52.

319. See *Oversight of the National Football League (NFL) Retirement System*, *supra* note 173, at 49.

320. See *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 284 F. Supp. 2d 511, 547 (S.D. Tex. 2003).

321. See *supra* Section II.D.

322. See *In re Enron Corp. Sec.*, 284 F. Supp. 2d at 547.

to both its composition and source of revenue used to pay out disability claims.<sup>323</sup>

With the increased threat of litigation under ERISA for breach of fiduciary duty due to a conflict of interest, the NFL should be willing to renegotiate the CBA to better protect its retired players. The renegotiation of the CBA should result in a change in the composition of the Board.<sup>324</sup> The Board should have no members appointed by the NFL owners; it should be totally independent from the NFL. Board members who are independent physicians would be better equipped to evaluate the credibility of injury claims by former players as well as comment on the necessity of medical procedures undergone by players.<sup>325</sup> This would aid in increasing the integrity of the Board. Independent members of the board that have no ties to NFL owners are a necessity to remedy the breach of fiduciary duty that plagues the decisions of the Board.<sup>326</sup> Also, a change in the composition of the Board would aid in providing credibility to its decisions.

Additionally, a renegotiation should give very little discretion to the Board regarding the allocation of points per injury.<sup>327</sup> This could be achieved by providing clear descriptions regarding injuries, surgeries, and the specific time frame that procedures need to be undergone in order to receive points toward a disability award.<sup>328</sup> Clearer guidelines would also reduce litigation following the Board's decisions, as a uniform application would decrease claims of abuse of discretion. Further, the reduced litigation from players would aid in the NFL's public image as there would be less media attention regarding injured players fighting for monetary relief from the NFL's disability plans.

## CONCLUSION

The increased negative public attention and knowledge regarding the traumatic effects of a career in the NFL on the well-being of current and retired players has led to more regulation in the NFL than ever before.<sup>329</sup>

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323. See NFL CONST. 1977 & 1978 Res. (2006) (stating that the NFL is authorized to receive network revenues and postseason game proceeds as an agent for the member clubs to make payments to the Player Retirement Plan).

324. See *supra* Section II.D.

325. See *supra* Section III.A.

326. See *supra* Section II.D.

327. See NFL PLAYER DISABILITY PLAN, *supra* note 154, at 22 (stating that the board uses a point system when deciding on disability claims).

328. See *id.*

329. See *supra* Section II.A.

However, it is clear that this increased oversight has not done enough to combat the effects of the physicality of the game.<sup>330</sup> NFL players are still suffering from concussions at an alarming rate despite modifications of regulations in the game and the enactment of the Concussion Protocol.<sup>331</sup> As a result, some of the NFL's best players have made the decision to retire early as a result of the negative effects on their bodies and concerns regarding long-term health.<sup>332</sup>

The creation of health and safety programs to better protect players has been achieved through collaboration by the NFL and NFLPA as displayed in the CBA.<sup>333</sup> This reveals that the CBA can be a mechanism for further collaboration between the two entities regarding the safety of players.<sup>334</sup> As the NFL continues to assert more control over health and safety committees, a precedent is being set to treat it as an employer of the players.<sup>335</sup> Additionally, the COVID-19 pandemic has resulted in even further collaboration between the NFL and the NFLPA regarding player health and safety.<sup>336</sup> The COVID-19 protocols have shown that the NFL does have the ability and capacity to assert control over the health and safety regarding players.<sup>337</sup> The COVID-19 protocols and the health and safety committees created in the CBA may set precedent for a renegotiation of the CBA which delegates injury care to the NFL.<sup>338</sup> This would be beneficial for players as the threat of increased litigation and liability for the NFL would lead to more stringent protocol and uniform standards regarding medical treatment.<sup>339</sup> However, this is not enough to solve the problems retired NFL players are facing.

A renegotiation of the CBA could aid retired players who are struggling to receive disability benefits as a result of injuries suffered during their careers.<sup>340</sup> The NFL's Disability Plan is governed by ERISA and the NFL is considered a fiduciary under the plan.<sup>341</sup> Further, the CBA states that eligibility for disability benefits are to be resolved by the

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330. *See supra* Part I.B.

331. *See* NFL PLAYER HEALTH & SAFETY, *supra* note 80 (displaying data for incidents of concussions from 2015-2021).

332. *See supra* Section I.B.

333. *See supra* Section II.A.

334. *See supra* Section III.A.

335. *See supra* Section II.A-C.

336. *See supra* Section II.B.

337. *See supra* Section II.B.

338. *See supra* Section III.A.

339. *See supra* Section III.A.

340. *See supra* Section III.B.

341. *See* NFL PLAYER DISABILITY PLAN, *supra* note 154, at 53.

Disability Board.<sup>342</sup> As a result of the NFL's fiduciary status regarding the implementation of the plan, claims for breach of fiduciary duty under ERISA can be asserted.<sup>343</sup> The use of the Disability Board can be said to breach the duty of loyalty that beneficiaries are entitled to.<sup>344</sup> Fiduciaries are expected to avoid conflicts of interest when executing the plan.<sup>345</sup> Previous litigation has pointed to the composition of the board, which is partly appointed by the NFL owners, to be a conflict of interest.<sup>346</sup> However, courts have not found this argument persuasive.<sup>347</sup> Another argument that can be asserted is that because the NFL uses its revenue to pay disability claims, conflict of interest can be asserted as the entity that is administering the plan is also paying the benefits required by the plan.<sup>348</sup>

The increased possibility of litigation through ERISA claims would aid in a renegotiation of the CBA which would benefit retired players.<sup>349</sup> Reforming the composition of the Board and limiting its discretion would be beneficial to former players.<sup>350</sup> The Board should have no involvement from the NFL and should be totally independent in its operation.<sup>351</sup> Additionally, there must be clear standards set out regarding the point allocation for injuries.<sup>352</sup> This would decrease the amount of litigation following the Board's determinations, as there would be little discretion present in the decisions.<sup>353</sup>

The NFL's increased control over their player's health and safety could set precedent for a renegotiation of the CBA delegating the responsibility of medical care to the NFL.<sup>354</sup> The allocation of injury care to the NFL would result in the NFL having liability for player injuries.<sup>355</sup> This increased threat of litigation would result in the NFL creating more stringent protocols and uniform standards regarding injury care and

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342. See NFL-NFLPA, *supra* note 100, at 327.

343. See NFL PLAYER DISABILITY PLAN, *supra* note 154, at 46.

344. See *supra* Section II.D.

345. See *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 284 F. Supp. 2d 511, 547 (S.D. Tex. 2003).

346. See *Boyd v. Bell*, 796 F. Supp. 2d 682, 690 (D. Md. 2011).

347. See *id.* at 690-91.

348. See *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 108 (2008).

349. See *supra* Section III.B.

350. See *supra* Section III.B.

351. See *supra* Section III.B.

352. See *supra* Section III.B.

353. See *supra* Section III.B.

354. See *supra* Section III.A.

355. See *supra* Section III.A.

treatment.<sup>356</sup> Further, regarding retired players, the CBA should be renegotiated in order to reform the process of receiving disability benefits.<sup>357</sup> The NFL has breached its fiduciary duty and duty of loyalty to players through a conflict of interest in the way it pays its claims and through the composition of the Disability Board.<sup>358</sup> Clear standards regarding point allocation and a totally independent Disability Board would aid in the standardization of benefits received by retired players.<sup>359</sup> The CBA provides a great mechanism for change regarding both current and retired NFL players.

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356. *See supra* Section III.A.

357. *See supra* Section III.B.

358. *See supra* Section III.B.

359. *See supra* Section III.B.

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