

Sports Law

Contributing editors
Centrefield LLP and Laffer Abogados



2019

GETTING THE
DEAL THROUGH 

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This article was first published in October 2018
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Published by
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First published 2018
First edition
ISBN 978-1-78915-121-3

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Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



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Preface

Sports Law 2019

First edition

Getting the Deal Through is delighted to publish the first edition of *Sports Law*, which is available in print, as an e-Book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Getting the Deal Through titles are published annually in print and online. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to Centrefield Law LLP and Laffer Abogados, the contributing editors, for their assistance in devising and editing this edition.

GETTING THE 
DEAL THROUGH 

London
September 2018

United States

Karen Hoffman Lent, Anthony Dreyer, David Schwartz and Matthew M Martino

Skadden, Arps, Slate, Meagher and Flom LLP and Affiliates

Regulatory

1 What is the regulatory governance structure in professional sport in your jurisdiction?

Sports leagues in the United States are typically governed according to rules and internal regulatory procedures set forth in league organising documents such as league constitutions and by-laws. In many cases, these documents establish a board of governors comprising team owners or their representatives, who are responsible for establishing and managing league governance and regulatory policies. The board of governors is also typically responsible for appointing a league commissioner who serves as a chief executive officer and is responsible for managing the day-to-day operation of the league. Although the organisational structure of each league differs, league foundational documents typically endow the commissioner with broad authority to manage all aspects of the league's operations and, in the majority of cases, to enforce league rules.

State and federal governments typically do not regulate the day-to-day operations of professional sports leagues in the United States. Rather, they give leagues wide latitude to regulate their activities internally and to set their own rules. Professional sports leagues must of course abide by state and federal laws that touch on their business activities. For instance, sports leagues must abide by antitrust, labour and sports gambling laws, among others. In addition, Congress has on occasion held hearings on sports-related issues. Recent congressional hearings have focused on steroid use in professional baseball, concussions in football, sexual abuse by Olympic officials and corruption within FIFA.

2 To what extent are participants protected from liability for their on-field actions under civil and criminal law?

While civil and criminal laws vary in each state, sports participants are normally protected from liability for their on-field actions. In the civil context, courts have generally held that sports participants assume the ordinary, foreseeable risks of the activity. Thus, injuries that occur as a result of on-field actions that are incidental to participation in the sport do not generally give rise to civil liability (see *McKichan v St Louis Hockey Club LP*, 967 SW2d 209 (Mo Ct App 1998) holding that a 'severe body check is a part of professional hockey and is not outside the realm of reasonable anticipation'). Participants may be subject to civil liability; however, when their actions are outside the ordinary scope of the sport, unforeseeable or particularly reckless in nature. For instance, one court described conduct that would give rise to liability in the sports realm as conduct undertaken with a 'deliberate, willful or [] a reckless disregard for the safety of the other player so as to cause injury to that player' (*Nabozny v Barnhill*, 334 NE2d 258 (Ill App Ct 1975)).

Although sports participants are not immune from criminal liability for their on-field actions, criminal charges are increasingly rare. A minority of states have even codified sports exceptions into their criminal statutes. Courts and prosecutors appear to prefer to allow leagues and on-field officials to punish offenders, but have intervened in certain instances – generally, where on-field conduct exceeded the bounds of what is considered normal game-play.

3 What is the regulatory framework for doping matters in your jurisdiction? Is there also potential secondary liability for doping offences under civil or criminal law?

Doping matters are generally handled internally by the leagues themselves. Each league, through collective bargaining with players' associations, creates procedures and guidelines for the administration of drug testing. These procedures usually consist of collecting random blood or urine samples that are tested by an independent laboratory. If an athlete is found to have taken a banned substance, punishments can range from small fines to suspensions and, in extreme cases, to lifetime bans from the sport. Athletes who wish to challenge a league's findings or punishment may file an appeal or grievance, which typically would be adjudicated in the first instance through arbitration proceedings at the league level. League drug testing procedures are also subject to judicial review, however, and must be administered in accordance with the general duties that the league owes players.

Athletes who violate league-administered doping guidelines can face civil or criminal liability for taking a banned or illegal substance. In practice, however, there have been very few instances of an athlete facing civil or criminal liability as a result of a positive test result. On the other hand, several athletes have faced perjury charges or civil suits as a result of making false statements to government officials in connection with doping allegations. Most notably, famed cyclist Lance Armstrong settled a lawsuit brought by the United States Justice Department (DOJ), in which the DOJ alleged that Armstrong had defrauded the US Postal Service (USPS) by making false statements regarding his use of the drug erythropoietin, a banned substance, and violated the terms of his sponsorship agreement with USPS.

4 What financial controls exist for participant organisations within professional sport?

Although financial controls vary by league, most major US leagues have agreed with their players through collective bargaining to set boundaries for team spending on player salaries. These controls consist of salary caps, luxury tax systems, predetermined entry-level contract structures, and minimum and maximum player contracts, among other limitations. Although, in essence, these limitations are aimed at achieving the same result – to ensure the financial viability of teams and promote competitive balance – each limitation operates differently. For example, the National Football League (NFL) imposes a salary cap and a salary floor (the maximum and minimum amount a team can spend on player salaries) on member teams, while Major League Baseball (MLB) constrains teams through a luxury tax that imposes penalties on teams if their spending goes over a certain threshold. Many leagues also enter into revenue-sharing agreements with the corresponding players' association, whereby the league and the players' association agree to allocate the leagues' revenue between team owners and the players according to a predetermined percentage.

Because each league has its own set of financial controls, a detailed reading of each league's by-laws, constitution or collective bargaining agreement (CBA) is necessary to obtain a complete understanding of the financial controls that each league has instituted, particularly with respect to operating standards such as team capitalisation requirements, borrowing limits and ownership standards.

Dispute resolution
5 Who has jurisdiction over the resolution of professional sport disputes in your jurisdiction, and how is this determined?

Jurisdiction over sports-related disputes depends on the nature of the dispute. League constitutions and by-laws typically require that disputes between the league, players, member teams, officials or other internal league stakeholders be resolved through arbitration, in many cases before the league commissioner as arbitrator. Procedures governing player-team disputes are often agreed upon during collective bargaining negotiations and formalised in the applicable CBA. While they differ among the leagues, procedures generally exist for appealing the internal decision of a league both within the league and to federal or state courts.

In some cases, disputes involving leagues or teams may be heard in state or federal court. Typically, this occurs when a litigant is not party to the league constitution or by-laws, its CBA or other governing documents, and thus is not bound by an arbitration provision contained in those agreements. These disputes are typically brought under state or federal law. In those cases, jurisdiction ultimately depends on the underlying laws regarding personal and subject-matter jurisdiction.

6 How are decisions of domestic professional sports regulatory bodies enforced?

After a league issues a decision there is typically an internal appeals process that is set forth in league organising documents or in the CBA with the players' association. This internal appeals process is often the final adjudicatory step available to litigants at the league level. As noted above, after exhausting their appeal options at the league level, players or teams may appeal the league's determination in federal court under a narrow set of circumstances set forth in the Federal Arbitration Act (FAA) or under the Labor Management Relations Act (LMRA).

Although it is unusual for players to challenge the outcome of a disciplinary hearing, it does happen from time to time. For example, Tom Brady challenged his four-game suspension after he was accused of using deflated footballs during a conference championship game. After a lengthy appeals process at the league level and in federal court, the suspension was upheld and Brady served the suspension.

7 Can the decisions of professional sports regulatory bodies be challenged or enforced in the national courts?

As noted above, a party seeking to challenge a decision by a professional sports body can typically appeal that decision in federal court in narrowly defined circumstances. The particular process that applies depends on the nature of the relationship between the parties. If the appeal sought is from an arbitration award in the labour context, then the appeal processes set forth in the LMRA apply. If the arbitration award is entered outside of the labour context, then the FAA's appeal procedures likely apply, with some limited exceptions.

The LMRA's standards for vacating an arbitration decision are notoriously high: a court reviewing an arbitration award must 'simply ensure that the arbitrator was "even arguably construing or applying the contract and acting within the scope of his authority" and did not "ignore the plain language of the contract."' (*National Football League Management Council et al v Tom Brady*, 820 F3d 527 (2d Cir 2016).) Similarly, parties seeking to appeal an arbitration award outside of the labour context may do so pursuant to the FAA under equally narrow grounds. Under the FAA, a party may seek to vacate an arbitration award where: (i) the award was procured through corruption or undue means; (ii) there was evident partiality or corruption in the arbitrators; (iii) the arbitrators were guilty of misconduct and a party was prejudiced; or (iv) the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

A party seeking to enforce an arbitration award must file a petition in federal court to confirm (a motion to confirm) such award within one year of the date the award was made.

Sponsorship and image rights
8 Is the concept of an individual's image right legally recognised in your jurisdiction?

There is no federally recognised image right, known in the United States as the 'right of publicity'. At least 30 states, however, have recognised a right of publicity, either through common law or a statutory provision. Typically, the right of publicity gives an individual the exclusive right to exploit his or her name, likeness or identity for commercial purpose. Infringement requires a showing that the defendant exploited the plaintiff's likeness for a commercial purpose without permission. While defences to infringement can vary by state, a First Amendment defence is available in all jurisdictions.

9 What are the key legal considerations for the commercialisation and protection of individuals' image rights?

Athletes commercialise their publicity rights through licensing agreements. The scope of these licences is determined by contract language, so it is vital that athletes and their representatives clearly define what uses licensees can make of their image, and whether any rights or categories are exclusive to the licensee or prohibited from use.

For example, in player agreements with teams, athletes retain the right to license their names and likenesses to third parties. But athletes also face contractual restrictions, most notably through a league's player endorsement policy and the morality clauses found in players' agreements and endorsement contracts.

Sponsorship conflicts may also create roadblocks to licensing publicity rights. For example, former NFL quarterback Colin Kaepernick was repeatedly fined US\$10,000 by the NFL for wearing Beats by Dre headphones after a game because Bose is the official headphones sponsor of the NFL. Thus athletes, leagues and advertisers must structure their agreements with these conflicts in mind.

10 How are image rights used commercially by professional organisations within sport?

Athletes enter into licensing agreements with several entities – their league, team, players' union and third parties – to allow these parties to commercially exploit their images for certain purposes.

In the player's contract with the team, the player typically grants both the league and the team the right to use his or her name and likeness for promotional purposes, so long as such use is limited to promotion of the league or team itself. For example, in the NFL's player contract, the player authorises the NFL to 'use his name and picture for publicity and the promotion of NFL Football, the League or any of its member clubs in newspapers, magazines, motion pictures, game programs and roster manuals, broadcasts and telecasts, and all other publicity and advertising media'.

Further, players may enter into endorsement contracts with third parties, either individually or through the players' union's group licensing programme. Under group licensing programmes, individual players assign their publicity rights to the players' union, which in turn can license to third parties the names and likenesses of groups of athletes. This provides an efficient way for sponsors to acquire publicity rights from a large number of players. Typical product categories for endorsements may include collectibles, video games and digital products, and apparel such as jerseys, hats and T-shirts. While possible endorsements are wide-ranging, they may be limited by each league's policies (eg, no hard-liquor sponsorships).

One notable and emerging trend is that businesses are increasingly making unlicensed uses of athletes' names and likenesses on the internet, in fantasy leagues and other areas. Courts have found that the First Amendment may pre-empt athletes' image rights in these contexts.

11 How can morality clauses be drafted, and are they enforceable?

Courts have long held that morality clauses are enforceable, and courts interpreting these clauses in sports endorsement contracts have accepted the basic premise that they are.

A well-drafted morality clause should identify the conduct that will trigger the other party's rights and the rights the other party has once the clause is triggered (eg, termination or suspension). Typical triggers involve conduct or accusations that cause the athlete to fall

into disrepute in the eyes of the general public, and may include getting arrested for drunk driving, conviction of a felony, or behaviour that stands at odds with values of the league, team or sponsor. Sponsors typically seek broad triggers, and athletes typically seek triggers that are narrow and as specific as possible. Players may also bargain for similar rights if their sponsor engages in or is accused of disreputable conduct (eg, unfair or unsafe labour practices). However, morality clauses found in player agreements between athletes and sports leagues are not negotiable on a player-by-player basis, as they are subject to the league's CBA.

12 Are there any restrictions on sponsorship or marketing in professional sport?

Each major sports organisation in the United States has rules or restrictions on player endorsements. These policies place restrictions on the entities with which athletes can enter into endorsement deals as well as the manner in which they may do so. For example, the PGA TOUR prohibits players from entering into sponsorships with 'casinos or gambling concerns of any sort', but allows players to be sponsored by beer, wine and liquor producers, subject to certain restrictions.

Besides gambling and alcohol, other common restrictions include prohibitions on sponsorships from tobacco companies, limits on logo usage, and restrictions on the manner in which an athlete endorses a product or service that competes with league or team sponsors.

Brand management

13 How can sports organisations protect their brand value?

The principal way for sports organisations to protect their brand value – aside from continuing to offer a popular and desirable entertainment product in association with the brand – is for the sports organisation to enforce intellectual property (IP) rights associated with the brand to protect against free-riding and enhance the value of exclusive sponsorship agreements. This is often easier said than done, and requires a broad approach to IP policing. Most major US sports organisations employ in-house paralegals and IP attorneys, as well as outside counsel, to monitor third-party trademark filings. Many also employ monitoring services to police content on social media and e-commerce sites. In addition, they work closely with law enforcement during major events to combat counterfeiting. Finally, they and their broadcast partners monitor third-party ads for potential ambush marketing (see question 20). When unauthorised conduct is detected, a swift cease-and-desist letter, take-down notice or similar action is often warranted to prevent free-riding on the sports organisation's brand.

14 How can individuals protect their brands?

Individuals involved in sports can protect their brands in much the same way as a sports organisation. Most importantly, an athlete's brand is tied heavily to their in-game performance and how they conduct themselves in public fora such as in interviews and social media. Like sports organisations, athletes must vigorously police against the unauthorised use of their names, images or likenesses for commercial purposes, taking enforcement steps where appropriate.

15 How can sports brands and individuals prevent cybersquatting?

The principal way to prevent cybersquatting involves a combination of robust enforcement and preventive registration. In advance of major sporting events, or the launch of a new team (or a team name or logo rebrand), sports organisations should promptly file trademark intent-to-use applications where possible, and register the most obvious domain names associated with those names. Because so many possible internet domain name permutations exist, however, a sports organisation must also have a domain name-monitoring and take-down process in place. Once a cybersquatter is identified, possible recourse includes a cease-and-desist letter, take-down notice to the webhost, or a WIPO or judicial proceeding. It must be kept in mind that fansites and gripe sites that use or incorporate a league or team trademark may be protected in the United States under the First Amendment.

16 How can individuals and organisations protect against adverse media coverage?

Given the strong protections accorded to the media in the United States, there is little an athlete or organisation can do legally to protect against adverse media coverage. Media outlets and other publishers have broad discretion to express their opinions on matters of public interest and on public figures such as professional athletes. Although every state provides some protection against false statements (typically under defamation law), they are particularly hard claims to sustain where public figures and matters of public interest are involved.

Broadcasting

17 Which broadcasting regulations are particularly relevant to professional sports?

The relevant broadcasting regulations are the Copyright Act of 1976, the FCC regulations and the Sports Broadcasting Act of 1961. The Copyright Act grants the right to broadcast a sporting event to the entity whose event is being broadcast and extends this protection to live sports broadcasts. As ownership in live-event broadcasting is increasingly determined contractually, most disputes today surround the retransmission of broadcasts. The FCC regulates retransmissions by allowing teams to prevent cable companies within 35 miles of a game telecast from broadcasting if the same game is not being broadcast locally ('blackouts'), and also prohibits multiple stations from carrying the same telecast.

Further, the Sports Broadcasting Act of 1961 immunises the NFL, MLB, NBA and NHL from antitrust liability for the pooled sale of 'over-the-air' broadcasting rights. As a result, broadcasting rights for most major sports leagues are negotiated by both the leagues and their individual clubs.

18 What means are available to restrict illegal broadcasting of professional sports events?

The Copyright Act protects the owners of copyright in game broadcasts by explicitly granting them exclusive rights over the transmission and retransmission of sporting events. Courts have expansively interpreted the Act to include transmissions in 'all conceivable forms and combinations of wired or wireless communications media' (*Nat'l Football League v PrimeTime 24 Joint Venture*, 211 F3d 10, 12 (2d Cir 2000)). They have also held that merely directing internet users to an infringing website or video is illegal.

Given courts' expansive interpretations of the Act, it generally affords broadcast owners robust protection. Emerging technologies like peer-to-peer file-sharing and live video-streaming networks, however, have presented potentially novel questions of the scope of protection under the Act. Moreover, because these networks typically operate outside the United States, it is often difficult to establish a jurisdictional basis in the United States for legal claims against such networks.

Event organisation

19 What are the key regulatory issues for venue hire and event organisation?

Venue and organisation operations are typically subject to state and local laws, as well as the federal Americans with Disabilities Act, which imposes certain accessibility obligations for those with special needs. A full summary is beyond the scope of this chapter, and event organisers should consult with appropriate local counsel on these issues.

20 What protections exist against ambush marketing for events?

Aside from clean zone restrictions that are occasionally imposed during major sporting events, there are no express ambush marketing laws in the United States. The main protections exist under other laws, such as trademark law, false advertising law and the law of unfair competition. A plaintiff in such a case typically must show that consumers encountering the ambush are likely to be confused or misled into believing the event organiser sponsored, approved or is affiliated with the ambusher. The strength of such claims often turn on consumer survey evidence and whether some protectable indicia of the plaintiff are used.

21 Can restrictions be imposed on ticket sale and resale?

The short answer is most likely yes, at least in most jurisdictions, and subject to limits imposed by antitrust laws. As a general matter, a ticket

is treated in most jurisdictions as a licence to enter a premises, which may be restricted or freely revoked for any reason or no reason at all, so long as it is not in violation of the ticket holder's civil rights. Relatedly, venue operators are permitted to impose restrictions on the conditions of entry. Those rights have been extended to permit operators to impose limits on ticket sales (including limits on the number of seats that one person or entity may purchase), or restrictions on resale. Two important caveats exist, however. First, agreements among competitors to restrain trade may be subject to scrutiny under antitrust laws. Second, some states, most notably New York, have adopted laws that prohibit operators from certain types of resale restrictions on season and subscription tickets. In recent years, ticket holders have challenged certain restrictions on ticket resale imposed by teams and venue owners. For example, restrictions requiring fans to purchase tickets from a specific ticket reseller and restrictions requiring season ticket holders to resell tickets through a designated website have been challenged under state consumer fraud statutes and the antitrust laws. Accordingly, although challenges to these types of resale restrictions have been unsuccessful to date, a careful consideration of applicable state and federal laws must be undertaken before implementing any resale restrictions.

As for season tickets, there is some disagreement among US courts regarding long-term season ticket arrangements, and whether such arrangements confer more than the traditional revocable licence upon the ticket holder. While a minority of courts have found that season ticket holders may have a right of first refusal or some similar property interest, US courts have largely found that a season ticket is still a revocable licence.

Immigration

22 What is the process for clubs to obtain work permits or visas for foreign professional athletes, and coaching and administrative staff?

For a foreign national to join a US team, either the club or the individual athlete, coach or staff member (depending on the Temporary Worker classification the person applies under) will generally file a Form I-129, Petition for Non-Immigrant Worker with USCIS. Typically, the individual or team, depending on qualifications and duration of stay, will qualify under the O-1A, P-1A or H-1B classification. Once the petition is approved, the individual athlete, coach or staff member may apply for his or her visa from a US embassy or consulate abroad and, once received, enter the United States.

If a foreign national intends to come to the United States to compete (but not be employed or paid by a US entity) as an individual athlete, or if a foreign-based team comes to compete in a single event, the B-1 classification may be used. Depending on the individual's citizenship, he or she may need to apply for the B-1 visa abroad.

23 What is the position regarding work permits or visas for foreign professional athletes, and coaching and administrative staff, temporarily competing in your jurisdiction?

Foreign nationals who are professional athletes, coaches and administrative staff may obtain a non-immigrant visa to work in the United States, typically under the following categories:

- The O-1, for 'Individuals with Extraordinary Ability or Achievement'. To qualify, one must demonstrate extraordinary ability (ie, level of expertise indicating that the person is one of the small percentage who has risen to the very top of his or her field) by sustained national or international acclaim; and be coming temporarily to the United States to continue work in the area of extraordinary ability. This applies to athletes, coaches and staff alike.
- The P-1A, for 'Internationally Recognised Athletes'. To qualify, one must be coming to the United States to participate in individual event, competition or performance in which he or she is internationally recognised with a high level of achievement, evidenced by a degree of skill and recognition substantially above that ordinarily encountered so that the achievement is renowned, leading or well known in more than one country. This category also extends to essential support personnel, which includes coaches, scouts, trainers and other team officials, and referees who are an integral part of a P-1A athlete's performance.
- The H-1B, for 'Specialty Occupations'. To qualify, one must hold a bachelor's or higher degree required by the specific specialty

occupation (or an acceptable equivalent). This classification may be applicable to certain coaches and administrative staff.

- Less often, H-2B, for 'Non-Agricultural Workers', may be applicable as well for individuals who do not meet the qualifications for O-1 or P-1A, such as minor league players.

24 What residency requirements must foreign professional athletes, and coaching and administrative staff, satisfy to remain in your jurisdiction long term or permanently?

To remain in the United States long term or permanently, either the club or the individual may apply for permanent residence in the United States, typically through the following categories:

- Employment-Based Immigration: First Preference EB-1 – This category applies with respect to individuals who demonstrate qualifying extraordinary ability.
- Employment-Based Immigration: Second Preference EB-2 – This category applies with respect to individuals who qualify as members of a profession that requires an advanced degree.
- Employment-Based Immigration: Third Preference EB-3 – This category applies with respect to individuals who qualify as skilled workers, with a minimum of two years of training or work experience, and professionals, whose position requires at least a US baccalaureate degree.

Once permanent resident status is granted, any of the following actions may result in abandonment of status: moving to another country with intent to live there permanently; remaining outside of the United States for an extended period of time, unless the individual demonstrates intent for a temporary absence; failing to file income tax returns while living outside of the United States for any period; or declaring oneself to be a 'non-immigrant' on US tax returns.

25 Do the family members of foreign professional athletes, and coaching and administrative staff, legally resident in your jurisdiction have the same residency rights?

Family members (spouses or dependent children under 21 years of age) of temporary non-immigrant workers typically qualify for the dependent non-immigrant classification of a temporary worker. Dependents in these categories are generally entitled to remain and attend school in the United States for the same duration of time as the temporary worker but may not legally work in the United States.

Family members (spouses or dependent children under 21 years of age) of an athlete, coach or administrative staff member who obtains permanent resident status, typically qualify their own permanent resident status. As permanent residents, such family members may attend school and legally work in the United States.

Sports unions

26 How are professional sporting unions incorporated and regulated?

In the United States, professional sporting unions (eg, the National Football League Players Association, the National Basketball Players Association, the Major League Baseball Players Association and the National Hockey League Players' Association) are subject to the same laws and processes as traditional labour unions. Pursuant to the National Labor Relations Act of 1935 (NLRA), the National Labour Relations Board (NLRB) oversees the formation of labour unions and the election of union leadership. The union formation process begins with a petition to the NLRB demonstrating support for the new union from at least 30 per cent of eligible employees. After a successful petition to the NLRB resulting in union certification, the union (including its members and representatives) is governed by the various legal regimes in the United States that apply to organised labour.

It should be noted that labour unions are not corporations, and thus do not file articles of incorporation with the state or federal government. Unions are formed and controlled by their members, who maintain the power to decertify the union by majority vote.

The NLRA is the primary body of law governing labour unions, including professional sporting unions. This legislation governs the rights of private-sector employees to form labour unions, engage in collective bargaining over terms of employment and working conditions,

file unfair labour practice grievances, and when necessary, to engage in collective strikes.

Like other unions, professional sporting unions are also subject to the LMRA. The LMRA's passage curtailed a number of union practices, including certain types of strikes and secondary boycotts. As applied to professional sporting unions, professional sports leagues and their member clubs have on occasion invoked section 301 of the LMRA to federally pre-empt legal claims filed by union members against the league or its member clubs that, according to the leagues, would be more appropriately adjudicated in accordance with the collectively bargained dispute resolution process.

In addition to federal and state labour laws, professional sporting unions are also required to adhere to the terms of the CBA with their respective leagues. A typical CBA between a professional sporting union and a professional sports league governs, among other matters, the terms and conditions of players' employment, player mobility, revenue sharing between players and teams, and adjudication processes for labour grievances and player discipline.

27 Can professional sports bodies and clubs restrict union membership?

Unionised private-sector employees, including members of sporting unions, have virtually unrestricted freedom to form and join labour unions. Specifically, section 7 of the NLRA provides that '[e]mployees shall have the right to self-organisation, to form, join, or assist labour organisations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection'. Further, section 8(a)(1) of the NLRA prohibits employers from 'interfer[ing] with, restrain[ing], or coer[cing] employees in the exercise of the rights guaranteed' under Section 7 of the NLRA. Thus, the statutory prohibitions against employer interference with the formation of and membership in such unions make it effectively impossible for professional sports bodies and clubs to restrict players from becoming union members.

28 Are there any restrictions on professional sports unions taking strike action?

All four major American professional sports bodies have encountered significant strikes and work-stoppages at various points in their histories. Typically, these strikes have resulted from the presence of perceived unfair terms and conditions of employment, or an effort by the players to achieve economic concessions (ie, higher wages or an increased share of the profit pool) from their respective league's owners. These strikes, whether they are aimed at rectifying perceived unfairness in the workplace or to gain greater economic benefits, are generally legal under the NLRA, but there are limits to the manner in which members of a labour union (including a professional sporting union) can strike. For example, strikes may be unlawful owing to their object or purpose, or as a result of misconduct by the striking employees. Perhaps the most important limit on the ability of professional sports unions to strike is the inclusion of a 'no-strike' clause in a CBA. Such clauses contractually restrict professional sporting unions from taking strike action for the duration of the CBA.

Employment

29 What is the legal framework for individual transfers? What restrictions can be placed on individuals moving between clubs?

Each of the major sports leagues in the United States functions under a separate CBA. Each CBA has specific free agency rules that restrict when a player may transfer between teams. The CBAs and specific player contracts are renegotiated periodically, and govern individual transfers. Additionally, in some leagues, teams themselves are limited as to accepting a player who may be a free agent if the team already has a specified number of active players on the team (ie, 'hit the cap').

30 Can individuals buy their way out of their contractual obligations to professional sports clubs?

Yes. The logistics of getting out of a contract vary depending on the league and the CBA details along with details in the player's contract. For example, in the NBA, a player may accept a portion of their

remaining contract, and the team would save a portion of what they would have paid had the contractual arrangement continued, and the player will then seek out a different contract with another team. In the MLB, player contracts often include an option after a specified number of years for the team to either keep the player or discuss a buy-out arrangement. The specifics on how the player is released from the contract vary, but it is possible.

31 What are the key athlete welfare obligations for employers?

As a general rule, participants in professional sports assume the risk of unintentional injuries, but will not assume the risk of injuries intentionally inflicted, or that result from a disregard for safety. Participation in contact sports constitutes implied consent to normal risks that attend with that sport. Negligence is insufficient to establish a cause of action, but wilful or wanton behaviour or reckless disregard for the safety of others will be grounds for a negligence suit.

32 Are there restrictions on the employment and transfer of young athletes?

Minors under 16 may not be employed during school hours pursuant to the Fair Labour Standards Act. Minors under 18 may not be employed in occupations the Department of Labour deems detrimental to their health or well-being. Additionally, states place further restrictions on child labour that may be more restrictive than the national standards.

The NHL and MLB allow a player to be drafted once he is 18 years old. The NBA requires players be one year removed from high school. The NFL requires players be three years removed from high school.

33 What are the key child protection rules and safeguarding considerations?

The main considerations in employing young people are their safety and education. Specifically in athletics, there is a concern with protecting young athletes by shielding them from physical injury and requiring them to mature emotionally and receive an education before entering the world of professional sports.

34 What employment relationship issues arise when athletes represent both club and country?

As mentioned, each of the major sports leagues in the United States are unionised and function under separate CBAs. The players of the major sports leagues are employees of their respective clubs and their employment relationships are governed by the respective CBAs. Additionally, the CBAs or leagues may restrict or limit a player's ability to represent his or her country in an international event. For example, the NHL did not suspend its normal season restricting its players from participating in the 2018 Winter Olympics.

35 How are selection and eligibility disputes dealt with by national bodies?

The International Olympic Committee grants the United States Olympic Committee (USOC) the right to represent the United States in all matters relating to its participation in the Olympic Games. The USOC, in turn, authorises a National Governing Body (NGB) as the governing body for each Olympic sport within the United States. The USOC and each NGB have their own dispute resolution processes, though the majority of disputes can be handled by the relevant NGB.

In the first instance, an athlete seeking to challenge an NGB's decision regarding an athlete's right to participate in competition may seek resolution of their dispute by filing a formal complaint with their sport's NGB. Subsequent to or concurrently with filing a complaint with the relevant NGB, an athlete may also file a complaint with the USOC under section 9 of the USOC Bylaws (a Section 9 complaint), which states that 'no member of the USOC may deny or threaten to deny an athlete the opportunity to participate in the Olympic Games, Pan American Games, Paralympic Games, a World Championship competition, or other such protected competition, as defined within the USOC Bylaws'. A Section 9 complaint must be filed within six months of the alleged denial of the right to participate. Filing a Section 9 complaint is purely a notice mechanism that alerts the USOC that an issue exists, and allows the USOC to intervene to attempt to mediate a dispute between the athlete and the NGB. After filing a Section 9 complaint, however, an athlete may seek a final resolution of their claim by

filing for arbitration with the American Arbitration Association (AAA). Arbitrations are typically held before a single arbitrator selected from a closed pool maintained by the AAA and the Court of Arbitration for Sport. Decisions rendered in these arbitrations are final and binding in accordance with the Commercial Rules of the AAA.

Taxation

36 What are the key taxation issues for foreign athletes competing in your jurisdiction to be aware of?

Foreign athletes pay US federal income tax at the same rates as domestic athletes on income from competing or other personal services performed in the United States. The applicable withholding regimes

vary based on whether a foreign athlete is employed by a team or self-employed. States generally follow a similar approach and subject athletes to state tax based on competition or other services performed in the state. Foreign athletes with endorsement deals must allocate the income from the deal between personal services and royalties for the use of the athlete's name and likeness. The different types of income may have different withholding and treaty eligibility consequences.

A foreign athlete who is in the United States for a substantial period of time may become a 'permanent resident' for tax purposes and subject to US federal income tax on his or her worldwide income. In such cases, one or more states may also assert that the foreign athlete is a resident of that state under similar rules.



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