



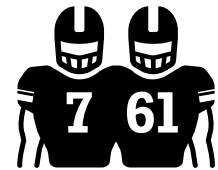
Protecting and Promoting the  
**Health of NFL Players:**  
Legal and Ethical Analysis and Recommendations

# Chapter 7

Christopher R. Deubert  
I. Glenn Cohen  
Holly Fernandez Lynch

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

## **SUMMARY:** **The NFL and NFLPA**



This document is a summary of the full chapter on The NFL and NFLPA in the Report *Protecting and Promoting the Health of NFL Players: Legal and Ethical Analysis and Recommendations*. The full chapter includes the following sections: (A) Background on the NFL; (B) Background on the NFLPA; (C) A History of the NFL's and NFLPA's Approaches to Player Health; (D) Current Legal Obligations of the NFL; (E) Current Ethical Codes Relevant to the NFL; (F) Current Practices of the NFL; (G) Enforcement of the NFL's Legal and Ethical Obligations; (H) Current Legal Obligations of the NFLPA; (I) Current Ethical Codes Relevant to the NFLPA; (J) Current Practices of the NFLPA; (K) Enforcement of the NFLPA's Legal and Ethical Obligations; and, (l) Recommendations. Here, we provide our Recommendations, with only the minimum necessary background information. For more information and analysis of the role and responsibilities of the NFL and NFLPA, including relevant citations, please see the full chapter.

The NFL and NFLPA are clearly in a position to protect and promote player health. There is also no doubt that both parties have made significant progress on this front in recent years, and that the NFL and NFLPA offer many benefits and programs intended to help current and former players. Nevertheless, there are still many important changes the NFL and NFLPA can make that will further advance player health.

Before explaining our recommendations for the NFL and NFLPA, it is important to review a key principle of labor law. The National Labor Relations Act (NLRA) obligates employers and unions to collectively bargain “in good faith with respect to wages, hours, and other terms and conditions of employment.” While there is sometimes debate about which issues must be negotiated, as a general matter, the NFL and NFLPA generally make progress on player

health issues through a collective bargaining agreement (CBA). Nevertheless, we do not intend to suggest that each of the below recommendations must be collectively bargained. We encourage collaboration between the parties but nonetheless urge progress first and foremost, including where that progress can be made unilaterally.

Additionally, it is again important to remember that the NFLPA’s legal duties are to current players – not former players. This is true even though the NFLPA has negotiated increased benefits and additional programs for former players many times. Indeed, beyond the NFLPA’s legal duties, we recognize that many former players rely on the NFLPA for information and assistance. Nevertheless, for reasons discussed in the Introduction, Section H: Scope of the Report, our recommendations focus on current players.

## Recommendations Concerning The NFL and NFLPA

### Goal 1: To make player health a priority.

#### **Recommendation 7:1-A:** The NFL and NFLPA should not make player health a subject of adversarial collective bargaining.

As discussed throughout this Report, collective bargaining is the principal method by which changes are made to NFL player health policies. Pursuant to federal labor law, this will and should continue to be the case. However, we do not believe that collective bargaining over player health issues should be an adversarial process.

We acknowledge the realities of labor negotiations and do not mean to naively suggest that the one party accept at face value every player health proposal the other might make. Nevertheless, if as part of its research or otherwise the NFL knows a policy or practice should change, it should do so without waiting for the next round of bargaining or by forcing the NFLPA to concede on some other issue. Indeed, for the NFL to demand a quid pro quo in exchange for improving player health policies or practices would be ethically problematic. For player health to be maximized, it is important that the NFL view the issue as an independent obligation of its own – rather than an issue to be forced upon it. Similarly, the NFLPA should not delay on player health issues in order to advance other collective bargaining issues. We hope the NFL and NFLPA have adopted and will in the future adopt this attitude toward collective bargaining.

#### **Recommendation 7:1-B:** The NFL and NFLPA should continue to undertake and support efforts to scientifically and reliably establish the health risks and benefits of playing professional football.

According to the NFL, “over the past 6 years the NFL has dedicated more than \$93 million in funds for scientific and medical research.” These funds have primarily been used to study traumatic brain injury, which is of course very important. In addition, as we have emphasized in this Report, it is important to focus on the health of the whole player for the

## Recommendations Concerning The NFL and NFLPA – continued

whole lifetime, which means also supporting research in other health domains. Without knowing the actual results of a football career over many different health domains, it is difficult to craft policies and practices that can maximize player health. On this point, the NFL has funded studies derived from data collected from medical screenings of 3,599 former players through the Player Care Foundation and the NFLPA has awarded funding to Harvard University for The Football Players Health Study at Harvard University. Research on these issues should continue.

**Recommendation 7:1-C:** The NFL, and to the extent possible, the NFLPA, should: (a) continue to improve its robust collection of aggregate injury data; (b) continue to have qualified professionals analyze the injury data; and, (c) make the data publicly available for re-analysis.

As explained in Chapter 1: Players, the NFL Injury Surveillance System (NFLISS) allows for the accumulation of current information about the nature, duration and cause of player injuries. Also as stated in Chapter 1, we rely on NFLISS data in this Report because it provides the best available data concerning player injuries, although we cannot independently verify the data's accuracy. We acknowledge that the NFL's past injury reporting and data analysis have been publicly criticized as incomplete, biased, or otherwise problematic, although we are not aware of any criticism of the NFLISS specifically. Without resolving the debate concerning the NFL's collection and use of injury data, we nonetheless stress the importance of accurate, comprehensive, and mandatory injury data collection – and meaningful disciplinary action for responsible parties (e.g., club medical staff) who fail to accurately record injury data.

If accurately collected, this data has the potential to improve player health through analysis by qualified experts, so long as it is made available to them. In particular, analysis can be performed to determine, among other things, the effects of rule changes, practice habits, scheduling, new equipment, and certain treatments, while also identifying promising or discouraging trends and injury types in need of additional focus. Notably, the NFL already conducts this type of analysis through Quintiles, as explained in Chapter 1: Players. Although the NFL does release some data publicly at its annual Health & Safety Press Conference at the Super Bowl, the data released is minimal compared to the data available and the analyses performed by Quintiles. For the data collected to have the potential meaningful applications mentioned above, it must be made available in a form as close to its entirety as possible. Such disclosure would permit academics, journalists, fans, and others to scrutinize and analyze the data in any number of ways, likely elucidating statistical events, trends and figures that have the opportunity to improve player health, as well as simply providing independent verification of any analysis done by Quintiles for added public trust. To be clear, we are recommending the release of more aggregate data, not data that could lead to identification of the injuries of any particular player or cause problems concerning gambling (see Chapter 18: Fans).

Publicly releasing injury data, nevertheless, comes with important complications that are discussed further in the full chapter.

**Recommendation 7:1-D:** The NFL and NFLPA should publicly release de-identified, aggregate data from the Accountability and Care Committee's player surveys concerning the adequacy of players' medical care.

As part of the 2011 CBA, the NFL and NFLPA created a joint Accountability and Care Committee (ACC) which is to “provide advice and guidance regarding the provision of preventive, medical, surgical, and rehabilitative care for players[.]” Among the ACC's responsibilities is to “conduct a confidential player survey at least once every two years to solicit the players' input and opinion regarding the adequacy of medical care provided by their respective medical and training

## Recommendations Concerning The NFL and NFLPA – continued

staffs and commission independent analysis of the results of such surveys.” Despite the provisions of the CBA, the first survey was not conducted until 2015. Moreover, no results of the survey have been made public.

We believe de-identified aggregate data from the results from the 2015 survey and all subsequent surveys should be made public, or at least made available to appropriate outside researchers. As discussed at length in Chapter 2: Club Doctors and Chapter 3: Athletic Trainers, there are serious questions concerning the relationship between club medical staff and players, including the possibility that at least some players do not trust the club medical staff – a serious concern for the efficacy of the patient-doctor relationship. Independent research on these issues is important, as it can allow qualified experts to analyze the data and identify potential areas of improvement. Nevertheless, as evidenced by the challenges in our own work, engaging players and club medical staff (including NFL permission) to participate in a research study is extremely difficult. The NFL and NFLPA have this data and thus can make it public to facilitate additional research.

This recommendation is reiterated in a forthcoming Special Report from The Hastings Center Report, to be published in December 2016.

**Recommendation 7:1-E: Players diagnosed with a concussion should be placed on a short-term injured reserve list whereby the player does not count against the Active/Inactive 53-man roster until he is cleared to play by the Concussion Protocol (see Appendix A).**

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

In the full chapter, we explain why we believe it is appropriate to treat concussions differently than other injuries in this respect.

**Recommendation 7:1-F: The NFL and NFLPA should research the consequences and feasibility of guaranteeing more of players’ compensation as a way to protect player health.**

Guaranteed compensation in the NFL is a complicated issue, and we are not here making a recommendation that NFL player contracts be fully guaranteed, as is generally the case in Major League Baseball, the National Basketball Association and, to a lesser extent, the National Hockey League. Many people – particularly some players – maintain that fully guaranteeing a player’s contract is a fair exchange for the health risks players undertake, a notion consistent with our ethical principle of Respect. In addition, given our focus here on protecting and promoting player health, if a player’s contract were fully guaranteed, he would likely feel less pressure to play through injuries in an effort to continually prove himself to the club, a notion consistent with our ethical principle of Health Primacy. Relatedly, job and income insecurity likely cause

## Recommendations Concerning The NFL and NFLPA – continued

stress and psychological harm for some players. However, we have concerns about the possibility of unintended consequences, as well as the feasibility, of such a recommendation to fully guarantee player compensation. These concerns are explained at length in the full chapter.

Ultimately, we recommend further research into this question, including player and club perspectives, economic and actuarial analysis, and comprehensive consideration of the relevant trade-offs, ramifications, and potential externalities. In the meantime, we note that the trend toward greater use of contractual guarantees can help promote player health and allow individual negotiation by players based on their own goals and priorities.

### Goal 2: To ensure that there are effective enforcement mechanisms when players' rights related to health are violated.

#### **Recommendation 7:2-A:** The CBA should be amended to provide for meaningful fines for any club or person found to have violated Sections 1 through 6 of Article 39 of the CBA.

Sections 1 through 6 of Article 39 contain a multitude of rules for clubs and club medical providers concerning player healthcare (see Appendix F), including the required standard of care for club doctors and a player's right to a second opinion paid for by the club. However, Article 39 does not contain any enforcement mechanisms. While the NFLPA or players could bring a Non-Injury Grievance or request an investigation before the Joint Committee (discussed in greater detail in Chapter 2: Club Doctors and Chapter 8: NFL Clubs), these processes are more likely to result in remedial – and not financial – action, particularly if no player has suffered distinct damage from the violation. Additionally, Recommendation 2:1-A in the club doctors chapter proposed a system of arbitration for resolving disputes between players and club doctors, e.g., claims of medical malpractice. While this recommendation offers possible remedial benefit to players, it should not be viewed as the exclusive enforcement mechanism against club doctors and other employees. Clubs and club medical providers should be penalized for violating the player healthcare provisions regardless of whether their bad acts result in clear and compensable harm to a player. Indeed, the CBA contains many provisions that permit fines without evidence of actual harm. If Article 39 is to be maximally effective, it should contain a fine system sufficient to deter violations and punish violators.

#### **Recommendation 7:2-B:** The statute of limitations on filing Non-Injury Grievances, at least insofar as they are health-related, should be extended.

The rights afforded to players under the CBA are only meaningful if there is meaningful enforcement. Nevertheless, there are at most a few health-related Non-Injury Grievances each year. This may be a result of few problems actually occurring, but it may alternatively reflect player concern about losing their job or status with the club. In particular, a player may fear that filing a Non-Injury Grievance would jeopardize the player's career, therefore causing him to forego the opportunity to pursue viable claims. Discussions with contract advisors confirmed that some players believe that filing a Non-Injury Grievance is not a viable option because of the likely effect on the player.

Currently, players have 50 days “from the date of the occurrence or non-occurrence upon which the grievance is based... or from the date on which the facts of the matter became known or reasonably should have been known” to file a Non-Injury Grievance. Setting a statute of limitations always requires trading-off protecting the injured party against the other side's interests in preserving evidence. There are tough judgment calls to be made in some cases, but the statute of

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limitations in this case is clearly too short to be fair. This statute of limitations is far shorter than the two- or three-year statute of limitations typical to negligence or medical malpractice actions under most states laws. Moreover, unless the player has left the club very close to the date of the action or omission that gave rise to the grievance, the player is unlikely to pursue a timely grievance.

We propose that the statute of limitations for Non-Injury Grievances be the latest of: (1) one year from the date of the occurrence or non-occurrence upon which the grievance is based; (2) one year from the date on which the facts of the matter became known or reasonably should have been known; or (3) 90 days from the date of the player's separation from the club, provided the Non-Injury Grievance is filed within three years from the date of the occurrence or non-occurrence upon which the grievance is based.

### Goal 3: To improve player access to and understanding of their health rights and benefits.

#### **Recommendation 7:3-A:** The NFL and NFLPA should continue and improve efforts to educate players about the variety of programs and benefits available to them.

As detailed in Appendices C and D, the NFL and NFLPA offer many benefits and programs to current and former players to help them on a wide spectrum of issues, including most importantly healthcare and career-related guidance. However, it appears that many players are not taking full advantage of these programs.

The NFL and NFLPA do both make some efforts to address this problem, as explained in the full chapter. While these efforts are steps in the right direction, they do not appear to have been fully successful, a problem with which many employers struggle. In interviews we conducted, some current and former players were generally unclear and unsure about what information they had received. There is room for additional ideas and efforts in this area.

Each preseason every player should be given a manual that lists and explains all of the different programs and benefits for which they are eligible, either through the NFL, NFLPA, or otherwise. Players should receive the manual again whenever their contract is terminated and again at or near the conclusion of the season. Providing the manual near the conclusion of the season is important because many useful programs and seminars are conducted during the offseason. We further recommend that this manual be a joint creation of the NFL and NFLPA, and that an electronic copy be provided to every contract advisor and financial advisor so they can advise their clients accordingly.

We also believe the NFL and NFLPA should make all benefit and retirement plans publicly available on their websites. Information about NFL player benefits is made available to players by the NFL and NFLPA through the website mygoal-line.com, and to contract advisors and financial advisors through the NFLPA's website. However, players can only access mygoalline.com with a username and password, the full plan documents are not readily available to contract advisors and financial advisors, and neither the NFL nor the NFLPA websites otherwise make publicly available information about any of the various benefit and retirement programs which are available to NFL players. These plans should be readily available so that current, former and future players, player family members, and other trusted advisors can review them to assist players. Public access will also allow academics, government officials and others with an interest in the topic to review the plans and potentially make recommendations that would improve the plans and players' health.

Finally, bare provision of information and documents to the players is not sufficient. Although players are ultimately responsible for taking advantage of benefits available to them, we know from behavioral science that too much information can be overwhelming and that certain approaches are more likely to result in comprehension and action. The NFL and NFLPA must work together (including potentially with experts in behavioral science) to ensure that the information



## Recommendations Concerning The NFL and NFLPA – continued

being provided to the players is understandable, digestible and actionable and that the players are actually processing the information. This will likely require substantial investments in education along with attempts to monitor whether players understand what they are being told.

**Recommendation 7:3-B:** The NFL and NFLPA should undertake a comprehensive actuarial and choice architecture analysis of the various benefit and retirement programs to ensure they are maximally beneficial to players.

Choice architecture refers to the ways in which choices are presented to consumers. A common and relevant choice architecture example is constructing retirement plans such that employees are automatically enrolled in them but allowed to opt-out if they so choose, which has the effect of “nudging” individuals into more favorable amounts of retirement savings. In addition to auto-enrollment, there are several other relevant choice architecture constructs, including claims processes, required documentation, payment schedules, notifications and assumptions about age, marital and dependent status, income and other information. A comprehensive analysis of how the NFL and NFLPA benefit and retirement programs are configured from a choice architecture perspective will help ensure that the maximum number of players are receiving the benefits to which they are entitled and in a manner that is most helpful to them.

**Recommendation 7:3-C:** The purpose of certain health-related committees should be clarified and their powers expanded.

As is discussed in the Enforcement section of various stakeholder chapters, players generally have three options within the confines of the CBA concerning healthcare-related problems – players can file: (1) a Non-Injury Grievance; (2) a complaint with the Accountability and Care Committee (“ACC”); or (3) a complaint with the Joint Committee on Player Safety and Welfare. While a Non-Injury Grievance can provide a player the opportunity to be compensated for a wide variety of wrongs, the Joint Committee and ACC are both supposed to be responsible for player health matters, including the possibility of conducting investigations. However, the authority of these Committees is unclear under the CBA and should be clarified.

At least one of the Committees should have the ability to conduct a thorough investigation and/or hold a hearing and make binding their findings and recommendations. If the responsible parties fail to comply with the recommendations, they should be meaningfully fined until there is compliance.

**Goal 4: To hold players accountable for their own acts affecting their health and the health of other players.**

**Recommendation 7:4-A:** The NFL and NFLPA should continue and intensify their efforts to ensure that players take the Concussion Protocol seriously.

As discussed in Chapter 1: Players, Section C: Current Practices, at least some players have sought to avoid undergoing the Concussion Protocol after suffering a suspected concussion. It is possible that players’ non-cooperation is sometimes a result of the concussion suffered and diminished capacity. However, other players who do so either do not fully understand

## Recommendations Concerning The NFL and NFLPA – continued

the risks of playing with a concussion or are so committed to playing and winning that they will continue to play no matter the possible health consequences. It is our understanding that both the NFL and NFLPA are providing players with information about the risks of concussions. Nevertheless, steps should be taken by the NFL and NFLPA, among others, to resolve issues concerning players' cooperation with the Concussion Protocol.

While the Concussion Protocol is generally helpful for ensuring players do not play with suspected or actual head injuries, it only works if players cooperate. Consequently, it is important that the NFL and NFLPA continue to educate players on the risks of concussions and the importance of the Concussion Protocol for both their short-term and long-term health.

If players do not cooperate with the Concussion Protocol even after substantial effort has been made to educate them on its importance, it may be in the interests of player health to adopt stronger deterrent mechanisms, including fines and/or suspensions.

**Recommendation 7:4-B:** The NFL and NFLPA should agree to a disciplinary system, including fines and/or suspensions, for players who target another player's injury or threaten or discuss doing so.

There have been instances in which players have openly discussed targeting a player's injured body part in an upcoming game. Generally, the NFL does not fine and/or suspend players unless they have violated the Playing Rules in an egregious way. However, when such threats are made, the NFL should not need to wait until the Playing Rules have been broken or a player is actually injured before taking action. The discussion or encouragement of targeting players' injuries increases the likelihood of players taking actions that unnecessarily harm other players and thus should not be tolerated. On this point, the threat to player health is too real not to act proactively.

**Goal 5:** For the NFLPA to take additional affirmative steps to hold accountable those stakeholders who do not meet their legal and ethical obligations concerning player health.

**Recommendation 7:5-A:** The NFLPA should consider investing greater resources in investigating and enforcing player health issues, including Article 39 of the 2011 CBA.

The 2011 CBA contains many provisions and rules concerning player health and club and club doctors' obligations related thereto. Article 39 of the CBA houses many of these obligations. However, as discussed above, there have been questions raised by some stakeholders we interviewed about the NFLPA's ability to investigate and enforce player health provisions through grievances. One possibility is for the NFLPA to hire additional attorneys with a focus on investigating and litigating player health, safety and welfare matters.



## Recommendations Concerning The NFL and NFLPA – continued

**Goal 6: To provide current and former players with the resources necessary to maximize their health.****Recommendation 7:6-A: The NFLPA should continue to assist former players to the extent such assistance is consistent with the NFLPA's obligations to current players.**

The NFLPA's principal obligations are to current players – not former players. This legal reality creates tension between the NFLPA and former players. In recent years, the NFLPA has made efforts to smooth this tension by negotiating benefits and creating programs intended to help former players. It is admirable of the current players that they effectively agreed to give up a portion of their potential income to help the players that came before them. The NFLPA should continue to try and balance these, at times, incongruent interests. To do so, the NFLPA can remind current players of the sacrifices made by former players and the different circumstances under which they played. The NFLPA works to advance the interests of current players, many of whom quickly become former players. Thus, the NFLPA should try to continue and help those men as much as it can.