1. Employment Law

1.1. Restrictive covenants

1.1.1. Is the principle of A POST TERMINATION RESTRICTIVE COVENANT known in your legal system? If yes, how can this principle be defined? Where does the principle have its origin? (Civil Code, case law, etc)

In the United States, the body of law on restrictive covenants highlights the tension between two important principles: (1) freedom of contract and (2) disfavor of restraints on trade.

In general, restrictive covenants are governed by state law, which means that the enforceability of a restrictive covenant varies state by state. Some states have enacted statutes governing restrictive covenants, but the majority of law is state common law derived from court precedents. States differ widely in the extent to which they are willing to enforce restrictive covenants. Generally speaking, however, because restrictive covenants are considered restraints on trade, employers wishing to enforce a restrictive covenant must demonstrate a protectable interest as well as that the restraints are reasonable.

Because of the variance among state laws, forum and applicable law are frequently litigated. Employers will choose the forum/law of a state whose public policy favors enforcement of restrictive covenants. Employees will then disregard the forum-selection clause and file a "declaratory judgment" action in a more favorable forum, seeking for a judge to declare the covenants invalid and/or that the employee is not in violation of the covenants.

1.1.2. At what stage in the employment relationship between employee and employer are post termination restrictive covenants agreed upon in your jurisdiction? Is there any relevant case law?

The employment relationship is not typically governed by a contract in the United States—rather, employees and employers have a noncontractual "at will" relationship where either party may terminate the relationship at any time without notice or payment.

In most states, initial employment is sufficient consideration for the covenants. In many states, due to the principle of at-will employment, continued employment is sufficient consideration, meaning that employers can require existing employees to sign a non-compete at any time without providing them any additional benefits. In some states, however, additional consideration beyond continued employment is required—a raise or any other benefit to which the employee is not otherwise entitled is usually sufficient. The more consideration given, however, the more reasonable a court will usually consider the covenants.

Restrictive covenants are most often entered into as follows:

- Confidentiality, Non-Competition and Non-Solicitation Agreement: Employees are often required to sign a confidentiality, non-competition, and non-solicitation agreement at the start of their employment or upon receiving a raise or a promotion, or agreeing to a particular benefit plan.

- Equity award agreement: Companies often require post-termination restrictive covenants in consideration for equity awards. These agreements frequently provide that the equity award is forfeited if the employee violates the restrictive covenants. In some states such as New York, these types of agreements are enforceable regardless of reasonableness because employees can choose to either abide by the noncompete or forfeit the equity—this is called the "free choice" doctrine. Other states treat these with the same scrutiny as they would any other restrictive covenant, however.
- Employment contracts: For employees who do have contracts(such as executives), employers often include restrictive covenants in those agreements.
- Settlement Agreement/Release: If employer and employee enter into a settlement agreement and release at the conclusion of an employment relationship, restrictive covenants (or reaffirmation of existing covenants) may be included. Note that negotiated terminations are less common in the U.S. than in other jurisdictions because of the at-will employment default—employers can simply end the relationship without payment.
- Corporate Transactions: In applicable situations, employers will structure a restrictive covenant as part of a sale of a business. For example, when a company buys another and hires the acquired company's owner, it is better for the purchaser to frame all restrictive covenants as part of the sale. This is a frequent topic of litigation because courts evaluate the covenants differently—as such, the defendant employee tries to argue that the covenants were employment-based while the employer argues the opposite.

1.1.3. Once the employment contract is signed, is there a general obligation of non-compete also in the absence of an express agreement after the termination of the employment? Are there specific statutory provisions or precedents referring to this? Could whistle blowing be regarded as a part of the employee's post termination restrictive covenant?

A common law doctrine exists in most states where the employee has a duty of loyalty to his or her employer, which prevents the employee from acting against his current employer's interest. This includes the duty to protect confidential and proprietary information. In some states, this duty may be codified in a statute. Some very high-level employees—executives, officers, directors, for example—also owe a heightened fiduciary duty to the company.

The law of unfair competition (also state-by-state) also requires employees not to use proprietary or confidential information unfairly to compete with former employers. Unfair competition law is often statutory—some states have adopted a version of the "uniform deceptive trade practices" act.

Similarly, a majority of states have enacted a uniform trade secrets act, where employers can sue to enforce trade secret protection.

If an employee engages in true whistleblowing as defined by federal or state law, this is a statutorily protected activity. Employers cannot prohibit statutorily protected activity by contract. Legal disputes in this area center around the issue of whether the employee's conduct legitimately constituted statutorily protected whistleblowing.

1.1.4. Which obligations regarding post termination restrictive covenants exist on the employer's side in the absence of an express agreement? Are there specific statutory

provisions or precedents governing employer's duties after the termination of the employment in your jurisdiction?

As described above, under the doctrine of at-will employment, employers and employees can terminate the employment relationship without notice or payment beyond what is due up to the date of termination.. After the employment relationship ends, the employer has no obligation with respect to the employee, except to respond to any claim for unemployment benefits.

1.1.5. What kind of different restrictive covenants that may be available and can be agreed between employer and employee in your jurisdiction? (see the examples in the introduction). Please describe how these can be defined and how they work in your jurisdiction.

The most common types of restrictive covenants are:

- Confidentiality: These almost universal covenants define very broadly (more so than the underlying common-law or statutory duty) what constitutes confidential information as well as what constitutes use/disclosure of such. Employees are typically prohibited from violating the confidentiality clause in perpetuity.
- Intellectual property: Another very standard contractual restriction is to maximize the employer's rights to inventions and copyrightable works created in the course of the employee's employment. Many companies have a standard confidentiality and intellectual property agreement that all employees sign, which may or may not contain other restrictive covenants such as the below.
- Non-competitition: The employee is prohibited from engaging in competitive activities with the employer during and for a period of time after the employment relationship ends. No compensation is required to be paid during the restricted period. In most states, employment or continued employment is sufficient consideration.
- Non-solicitation of clients: The employee is prohibited from soliciting clients or potential clients of the employer during and for a period of time after the employment relationship ends. Sometimes "clients" is defined to include only those with which the employee had material dealings with for the final X months of employment (this increases the likelihood of enforceability). Prohibited activity often includes encouraging clients to terminate or reduce business with the former employer. No compensation is required to be paid during the restricted period. In most states, employment or continued employment is sufficient consideration.
- Non-solicitation of employees: The employee is prohibited from recruiting colleagues during and for a period of time after the employment relationship ends.
- Non-hiring and non-dealing: These covenants exist in concept, but are rarely enforceable and raise potential antitrust concerns. These are similar to the two nonsolicitation covenants above, except that they not only prohibit transactions the former employee initiates, but also those intiated by the colleague/customer as the case may be. While employers would like to include this type of covenant due to proof problems on solicitation, these are so infrequently enforced they are rarely seen.

1.1.6. What are the conditions for a valid post termination restrictive covenant in your jurisdiction? (e.g. prerequisites like minimum age, minimum salary, minimum employment period; way of termination of employment, etc.). Please describe the conditions applicable and how these work in your jurisdiction.

As a general rule, there are no *per se* prerequisites for a post-termination restrictive covenant to be valid—rather, factors such as salary, tenure, and termination circumstances may factor into a court's analysis of reasonableness. Other examples of factors affecting reasonableness are, for example, an employee's position level and access to confidential information. States with specific post-termination restrictive covenant statutes may specify such types of factors as prerequisites, but unambiguous, quantifiable rules are unusual. Typically statutory prerequisites are of the nature that would be subject to interpretation or argument. Termination circumstances is one example—some states hold that noncompetition covenants are void if the employer is in breach of a contract or terminates the employee without cause. Some other examples of considerations courts use to determine enforceability of a noncompete (though rarely if ever considered absolute):

- Employee's reasonable understanding of the restrictions upon him or her;
- Bad faith by the employer or employee;
- Employee's position (executive or rank-and-file employee);
- When the restrictive covenant agreement was signed;
- Employee's bargaining power;
- Employee's experience and expertise;
- Consideration and compensation for the covenant.

In some states, certain types of restrictive covenants are simply void. California treats post-termination non-competition covenants as void, and prohibits employers from requiring employees to sign restrictive covenants as a condition of employment, holding any employer who asks an employee to agree to a post-termination noncompete liable for wrongful termination if the employee is not permitted to work as a result. Likewise for nonsolicitation covenants, California only enforces these to the extent necessary to prevent unfair competition.

1.1.7. What is the potential scope of a post termination restrictive covenant in your jurisdiction? (e.g. taking into consideration time, geographical scope, content, interest, activities; etc.). Please describe how that works in your jurisdiction and what pitfalls have to be observed for both employers and employees.

When courts evaluate reasonableness, they usually balance the employer's legitimate interest against the hardships to the employee and the public interest. Many states require that covenants be no greater than necessary to protect the employer's legitimate interest. What is considered a legitimate interest varies from state to state, but commonly held to be legitimate interests include confidential information, trade secrets, and customer relationships.

Courts consider reasonableness of time, geographic scope, and scope of activities. States vary widely, and also take into account factors such as the industry (for example, courts may find that technology companies are more likely to be harmed by employees with confidential information competing). Some general principles:

- Duration: For all except the highest-level employees, two years post-employment is the maximum enforceable duration for the restricted period in a non-compete (6 months-2 years is a typical length).
- Geography: While some states refuse to enforce any covenant that lacks a geographic restriction or contains a worldwide restriction, other states may do so if they find that that level of restriction is necessary to protect the employer's interest.
- Activities: Some states do not *per se* require any particular limitation on the activities, and will enforce a restriction against any activities competitive with the employer. Courts tend to prefer clauses more narrowly tailored to the employee's activities performed for the employer, however.

1.1.8. What are the possible sanctions against the employee in the event of a breach of a post termination restrictive covenant? Describe how that works in your jurisdiction and provide for practical information about the dos and don'ts.

When an employer perceives that an employee has breached a restrictive covenant, typically the employer will attempt to obtain emergency temporary injunctive relief preventing the employee from breaching the covenant. The initial form is called a "temporary restraining order," a short-term injunction that can be obtained on a lower proof standard (and can sometimes be issued *ex parte* without providing the other party an opportunity to respond), but that lasts only until a hearing on whether the employer is entitled to a "preliminary injunction" – a longer-term but still temporary form of relief that lasts until a merits ruling can be reached. To obtain a preliminary injunction, an employer would have to show a likelihood that if the injunction were not granted, "irreparable harm" would result.

If a court finds breach but deems injunctive relief too extreme, employers can also obtain damages they can prove. Sometimes new employers will shoulder the financial burden of a lawsuit from the former employer

For restrictive covenants entered into in exchange for equity awards or deferred compensation, under the agreement employees who breach the non-compete will forfeit the award or compensation, or will have to repay it. Historically, such agreements have been enforced regardless of reasonableness because the employee is not actually restrained from compensation, but can make the choice to forego the compensation instead. But increasingly, states are treating these types of agreements with the same scrutiny as other restrictive covenants (e.g., will not enforce unless reasonable under the typical restrictive covenant standard).

1.1.9. What are the possible sanctions against the new employer in the event of a breach of a post termination restrictive covenant by the employee of the former employer? Is it a matter of unfair competition in your jurisdiction?

The former employer may assert a claim of interference with a contractual relationship, if the employee is under a contract as opposed to an at-will relationship. The former employer would need to show that the new employer knowingly solicited an employee bound by a contract. Even if the employee is in an at-will relationship, some courts will find a valid interference claim based on the restrictive covenant agreement. New employers may assert the affirmative defense available in many states that there was economic justification. They also typically bootstrap their defense onto the arguments against enforceability of the

covenants themselves—in other words, they argue that they did not interfere with a *valid* agreement.

1.1.10. When an employer has invested money in an employee's training, is there any possibility for the employer to get a refund from the employee, in case of breach of the post termination restrictive covenant, and under which conditions?

There are states that consider specialized training as legitimate protectable interest, but courts typically do not find this to be a basis for damages.

1.1.11. What are the possibilities of lawsuit for the employee in case of the employer's disadvantagous actions during a period covered by a restrictive covenant (e.g. the employer prevents the employee from finding a new job by spreading out rumours)?

Employee lawsuits during restrictive covenant periods are normally actions seeking to declare the restrictive covenant invalid. These lawsuits are common when the employer has, e.g., communicated the existence of a restrictive covenant to a new or prospective employer; sent a "cease and desist" letter to the employee; or even where neither of these has occurred but the employee anticipates a lawsuit by his or her former employer.

Other possible claims on behalf of the employee are not usually tied to the restrited period or the covenant. An individual may bring a defamation claim against a former employer spread false information. Even if true, employees could bring an invasion of privacy claim if the employer disparaged the employee using private information. Employees have tried to raise this type of claim even where, for example, the person spreading "rumors" was a rank-and-file employee with no arguable authority to represent the company. In one case, a grocery store employee told a customer who asked about a recently-departed employee that the employee had been fired and was a drug addict—this was true, but the employee in question sued the grocery store chain for invasion of privacy.

1.2. Garden Leave

1.2.1. Does the concept of "garden leave" exist in your jurisdiction? How does it work, what is the scope and what are the prerequisites?

Garden leave is uncommon the United States. In circumstances where "garden leave" is used it is not usually referred to as such.

The reason for this is because at-will employment is the default employment relationship in the United States, and employment relationships are terminable without notice or severance. Employers often provide severance in case of an economic termination, but are not usually kept on the payroll. If there is an unusual circumstance where the parties would want or need to keep someone on the payroll after active employment has ended, that would usually be referred to as administrative leave and not need to be paid and would depend on the parties' agreement.

Executives and other highly-paid employees may have employment contracts, but even in those contracts the "garden leave" provisions common in other countries are relatively rare. Any provision requiring an employee to continue working for a specific employer (even if not performing services) would be unenforceable, as this is considered unconstitutional indentured servitude—at most, the employer might recover damages it could prove.

Some employers (especially in the financial services industry) have attempted to impose notice provisions on purportedly at-will employees. These "garden leave" provisions require employees to give a certain number of days' notice, at which time the employer may require the employees to perform duties or relieve them of duties, and the employee continues to receive pay during the notice period. The extent to which these provisions would be enforced against an employee wishing to resign with immediate effect are unclear, as there is little case law on this subject—and courts have come out in both directions on the issue. Most likely such provisions would be treated as post-termination covenants not to compete. The provisions are more likely to be enforced if the consideration is something the employee would probably not otherwise have received—a separate bonus and not a raise or as a condition of an existing bonus.

1.2.2. Talking about garden leave provisions: do employees – or certain types of employees – have a right to be "actively employed" in your jurisdiction, e.g. so that a garden leave provision would not – or not be fully – be enforceable for an employer and the employee would have a "right" to continue working until the end of the employment? What is the respective legal framework in your jurisdiction?

As mentioned above, employees (unless the employer voluntarily enters into a contract with them) have no statutory rights to be employed for any particular time and may be terminated at the will of either party without notice or severance. If an employee and employer contractually agree to a notice period, that employee would not have any separate rights to work "actively" during that period. Any garden leave provisions would be enforceable in accordance with general contract law (state-specific and usually largely on case law). And as set forth above, there are enforceability questions with respect to employees subject to a notice period but wishing to resign with immediate effect—these types of provisions are likely to be treated as post-termination restrictive covenants.

1.3. Are there any other specific means to protect the employer's interest at the end of an employment contract in your jurisdiction? Please explain in detail and provide for practical guidance.

As mentioned above, most employees are employed under an "at-will" structure, meaning that they have no employment contract and the employment relationship may be terminated by either party at any time without notice or payment.

Restrictive covenants—including robust confidentiality clauses—are the primary way to protect an employer's interest at the end of an employment relationship. Apart from this, some employers may enter into an independent contractor relationship with former employees, where the individual is paid to remain on retainer as a consultant in case issues come up, and is subject to a conflict-of-interest provision during the term of the contract. This approach is usually reserved for senior executives and other key employees, and most often in the context of retirement.

Other statutory or common-law-based claims have been discussed above, including unfair competition claims, breach of fiduciary or loyalty duty claims, breach of trade secret protection statutes, and claims against new employers for interference with contractual or business relationships.

Finally, the Computer Fraud and Abuse Act (CFAA) is a federal statute (mostly containing criminal provisions but also authorizing civil actions) that prohibits individuals from using a computer to obtain or send trade secrets without employer authorization. Employers have increasingly included CFAA claims in lawsuits to enforce restrictive covenants, sometimes strategically in hopes that they will be able to litigate in federal court, or to gain leverage in an anticipated negotiation. The employer would likely have to prove a loss of at least $5,000 to sustain such a claim, however.

2. The World of Sports and Employment Law

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2.1. General questions

2.1.1. Does employment law apply to the relation between athletes and sports clubs/Associations in your jurisdiction? Are there relevant differences between the kinds of sports and between professionals and amateurs?

[NOTE: CORRECTED TYPO "athlete's" should be "athletes"]

Statutes

Employment laws apply to the relationship between athletes and sports clubs in the United States. This means that—just like any employee—athletes can bring discrimination claims under federal employment statutes such as Title VII of the Civil Rights Act of 1964 (as amended), the Americans with Disabilities Act ("ADA"), and the Age Discrimination in Employment Act ("ADEA").

Statutory discrimination claims are relatively rare, but they do exist. For example, golfer Casey Martin sued the Professional Golfers' Association of America ("PGA") under the ADA because the PGA denied his request to use a golf cart during a qualifying tournament. Martin asked for this accommodation due to a rare blood disorder that impacted his legs, making it impossible for him to walk the course. Martin ultimately won—albeit under the "public accommodation" prong of the ADA as opposed to the employment prong—because the court found that "it does not fundamentally alter the nature of the PGA Tour's game to accommodate [Martin] with a cart." *Martin v. PGA Tour, Inc.*, 994 F. Supp. 1242, 1251-52 (D. Or. 1998).

Additionally, workers' compensation laws (which vary by state) apply to athletes in principle, though the scope of application is the subject of some controversy. Professional sports leagues have lobbied state legislatures to pass laws limiting workers' compensation claims. Injury-based claims are on the rise, particularly from football players alleging long-term debilitating head injuries—a subject of recent concern with widespread media coverage.

Contracts

The primary source of law governing the relationship between athletes and sports organizations is contract law. Professional athletes usually enter into contracts with their employers (teams)—a departure from the general rule of at-will employment in the United States. These contracts are typically uniform contracts with individual riders attached (well-known free agents may negotiate different contracts, but this is the exception). In addition, collective-bargaining agreements (CBAs) apply to all major sports. The result is that most players are subject to the same restrictions, albeit by contract as opposed to statute—and the courts would review these under state-contract-law precedent (usually caselaw as opposed to statute).

The term lengths of players' contracts are largely determined under the CBAs, at least for the first years of a player's career. At a very high level, the basic structure is as follows: newly-drafted players are bound to the team that drafted them for a certain number of years. During the first part of the term (a designated number of years), a player is not permitted to sign or negotiate with other teams. For example in Major League Baseball, after three years (or 2.83 rounded up) of major league service time, a player is eligible for the arbitration process to negotiate with his team. If the team does not offer the player a contract, he is said to be "non-tendered" and is granted free agency at that point. After that initial period and for the remainder of the contract term, a player remains under contract with their team for the remainder of the contract term, but is granted "free agency" and may negotiate with other teams. If the player signs with another team during this second phase, the new and former team will typically negotiate a deal to close out the player's contract with the former team (either money or draft picks). At the conclusion of the contract term the player can re-sign with the current team or sign with another team.

In addition to the term lengths, the following are some typical contract provisions and frequent issues that come up with respect to athletes, which would be governed by individual contracts and/or collective-bargaining agreements:

- Players cannot play other (professional) sports
- Players must keep in top physical condition
- Players must continue to exhibit sufficient skill
- Players must maintain good citizenship and sportsmanship
- Force majeure (situations beyond either party's control that prevent the contract from being performed)
- Players cannot engage in hazardous off-the-field activity
- Performance-based incentives and vesting options (player might get an extra million for winning an MVP award, or a contract extension by remaining healthy and playing a certain number of games)
- Off-the-field obligations, personal appearances, marketing and endorsements
- No-trade or limited-trade clauses
- Very popular players may have "post-retirement" options included in their contracts, which may provide a position in a team's management, broadcasting, player development, or some other area where their notoriety can benefit the team.

The initial hiring process itself ("drafting") is quite unique as well, as noted below.

Amateur sports (college) are quite different. College sports funnel to professional leagues, and the governing body is the National Collegiate Athletic Association. To become a college player, many top high school players are recruited by scouts. Colleges with popular sports programs offer scholarships to top players, but the college athletes are not paid compensation beyond scholarships, and are subject to strict rules on "gifts" they may accept. There is increasing support for college athletes to be paid, considering the huge revenues being generated by programs in today's NCAA.

2.1.2. Are there specific employment law provisions (statutes, rules of sports associations) applicable for athletes in your jurisdiction? In particular regarding post termination restrictive covenants and/or garden leave provisions and/or the right to continue to work?

[NOTE: CORRECTED TYPO "provision" should be "provisions"]

Aside from implications arising from regulations on intercollegiate athletic programs (including Title IX of the Civil Rights Act of 1964), there are no federal statutory or regulatory employment laws that apply to athletes and not other employees. The sports-specific law is derived by internal rules and the CBAs.

For example, the initial hiring of professional athletes is quite unique. The teams utilize a "draft" system, where those who want to play professional athletics enter the "draft" and the teams have an agreement amongst themselves where they pick or "draft" players—teams pick in a certain order and have a certain number of picks. Those players who sign up for the draft are bound by it—players cannot choose which team they will start their career with, they can only choose to sign with the team that drafts them or not. If they go undrafted, they can sign as a free agent, but obviously will not command very much at that point.

Garden leave is not standard parlance in U.S. employment law, as detailed above, and there are no relevant statutory provisions of note. Nevertheless, a somewhat analogous concept exists under applicable CBAs, where athletes who resign from one team are not paid and are not permitted to sign with another team. Teams or the League may place athletes who breach their contracts (e.g. for a violation of team conduct or other rules, violation of the CBA such as use of performance-enhancing drugs) on "suspension." While on suspension, athletes are not paid and may not work for another employer in the league. While a suspended player cannot sign with another team in that league, he may join a different entity altogether (a suspended National Hockey League player may go play competitive hockey in Russia or Europe).

Athletes are not generally subject to restrictive covenants beyond the fixed term of their contracts (the length of which is usually determined under applicable collective-bargaining agreements), though individual contracts in principle could contain some clauses that govern post-termination conduct. How this typically works is that after a certain amount of time, athletes can become "free agents" and seek to join another club. If athletes seek to work for another club before that time, this is considered a breach and the athlete may be suspended as mentioned above. Similarly, an athlete may be *de facto* suspended if he refuses a trade or if there is turmoil within the team. Another way athletes can breach is by playing other sports in violation of their contracts.

Athletes may bring claims grounded in breach-of-contract or quasi-contract (e.g., recovery for "unjust enrichment" based on the value of their services). Some issues may be subject to a specific dispute resolution process under the applicable CBA.

The above scheme is essentially a monopoly, which in principle is prohibited under U.S. federal antitrust laws but is subject to exemption based on the CBA process—discussed further in section1.3 below.

2.1.3. Is there a specific court or arbitration system for employment matters between athletes and clubs in your jurisdiction? Are those arbitration proceedings obligatory before going to court?

This too is governed by contract. Some collective-bargaining agreements contain dispute-resolution procedures requiring arbitration of certain types of claims. For example, Major League Baseball has established an arbitration procedure for salary-related claims.

2.2. Transfer Fee System and termination of contracts

2.2.1. a) For the EU Member States: Describe how the Bosman case has changed the situation in your jurisdiction and if/how the sports associations and the legislator have responded to this judgement.
b) For the NON-EU Members States: Was there a similar judgement or event that changed the system in your jurisdiction?

"Transfer fees" are not common in the relevant agreements in the United States—as discussed above, the agreements generally contain fixed terms, during the initial portion of which the player cannot join another club. After that term, the player free to negotiate with other clubs to the extent the contract permits. Those who negotiate with other teams in violation of a contract can be charged with tampering. After the term expires without renewal, the player is generally not restricted from joining other clubs and would not have to pay any fee to do so. Because the collective agreements apply leaguewide, any deviation from this practice would be unusual.

2.2.2. Are there specific laws or regulations of sports associations (different from the general rules) dealing with the termination of athletes' employment contracts in your jurisdiction? Are such contracts usually open-ended or do they run for a fixed term? Are there any restrictions for fixed-term contracts in your jurisdiction?

These "rules" are derived from the CBAs—and are quite complex. They generally address subject matters such as disciplinary sanctions and termination of contracts, as well as trading players. The leagues also have policies related to the use of performance-enhancing drugs. Another issue discussed in the CBAs are salary caps, which are limits to total payroll imposed upon each team. Major League Baseball does not have a salary cap (the driving force behind the players' strike of 1994) while other sports do.

<u>Player-initiated termination</u>

As described above, players are usually subject to specific contract terms, during the initial portion of which they cannot play for another team. If a player resigns at this time, he will generally not receive compensation and is restrained from playing in the league until his contract permits or expires.

Team-initiated termination

The team can terminate a player's contract on a number of grounds, including those described in section 2.1.1 above (lack of physical fitness, lack of citizenship, etc.). This is referred to as "cutting" the player from the team. When a team cuts a player, it usually does not provide a specific reason—after being cut, the player's treatment depends on the CBA—in MLB, the team continues to pay the player for the remainder of the contract (unless the team is not required to under the contract based on the ground of termination); in the NFL contracts are "non guaranteed" and the players are not necessarily paid. If another team wants to sign a player who has been cut, depending on the timing, the team must go through a process of obtaining approval from the other teams, called "waivers."

Teams can negotiate with other teams to trade players. What happens to the individual player's contract depends on the sport. For example, in MLB, a player's contract will simply transfer to their new team, while in other sports a new contract. This is often a major sticking point in trade negotiations (if a player is thought to be overpaid for their current/projected worth) so that a former team may contribute cash toward the player's future salary to help complete the deal. Unless (i) a player has negotiated a "no-trade" or "limited-trade" clause upfront or (ii) in some sports, has attained enough seniority under the applicable CBA to be able to "veto" the trade (in MLB, 10 years total in the league and 5 consecutive years on the same team; in NBA it is 8 years total and 4 consecutive years on the same team), the player is required to report to the new team when the trade is effective. If the player does not, it is in essence treated as a resignation and subject to the above practices (the player does not receive pay and cannot play for another team in accordance with the original contract). Another maneuver is the "sign-and-trade" common in some sports but prohibited by MLB. This involves a free agent player signing a contract during the offseason, then being traded to a new team before playing in any games for the initial signing team, which can be favorable for a team trying to calculate salaries and remaining "cap space." In MLB, a player cannot be traded until halfway through the first year of his contract. The trading process may involve "waivers" as well, again depending on the timing.

2.2.3. Can a player switch the club during the term of the employment contract for a certain transfer fee without the consent of the former club in the absence of a respective clause? Is it obligatory in your jurisdiction to agree on such a clause and a certain transfer fee?

As discussed above in section 2.1.1, player trades and free agency are governed by contract, and the relevant collective-bargaining agreements generally contain specific provisions related to this. . Players wishing to attain "free agent" status before their contract allows must obtain permission from the applicable league, which is rarely granted.

2.2.4. What are the remedies for the former club in your jurisdiction, if a player switches the club during the term of the employment contract without the consent of the former club and without the payment of an agreed transfer fee?

Players unilaterally signing with other terms rarely if ever occurs because teams are all a part of the same system and would not sign players who are signed with other teams unless they are "free agents" (which as described above, usually happens after a certain number of years of league play, governed by the CBA). As discussed above, subject to the applicable CBA, if the athlete violates his contract including by signing with another team in violation of the contract, the employer may place the employee on suspension, generally without pay.

2.3. Are there any further conflicts between employment law and the employment practice of sports clubs and associations in your jurisdiction? Please describe relevant cases or judgements.

Antitrust

To foster fair competition, United States federal law prohibits illegal monopolies or attempts to monopolize, as well as illegal contracts in restraint of trade (e.g. two companies in the same industry agreeing not to hire each other's employees). Professional sports leagues are comprised of teams that, practically speaking, are competitors with each other. Nevertheless, all league teams form a system of detailed rules governing the initial hire (draft) and trading of players. The procedures on their face would seem to violate federal antitrust law. But by statute as further developed in case law, the collective bargaining process is exempt from antitrust scrutiny in order to promote cooperation among employers and employees. Agreements between a group of unionized workers—including a union of professional athletes—and management will not be considered illegal.

Because of the inherently monopolistic nature of sports leagues, however, a number of antitrust challenges have been raised. For example, in 2010, the NFL initiated a lockout after unsuccessful negotiations for a new CBA. In response, the players dissolved their union and initiated an antitrust lawsuit claiming that the NFL's actions constituted an illegal boycott. A similar lawsuit involving the NBA was brought around the same timeframe. The players in these cases argued that the exemption did not apply when the union was no longer established and negotiations were not in session. Though a federal district judge in the NFL case issued an injunction against the lockout (overturned in part), both disputes settled before any merits ruling was issued on the antitrust issues.

Labor Relations

The same failed negotiations prompted both leagues' players to file charges with the National Labor Relations Board ("NLRB"), alleging that the leagues were engaging in unfair labor practices by making unreasonable demands that would inevitably lead to lockouts. Again, the matters settled before the NLRB acted on the charges.

Injuries

Injuries are also common subject of concern. Contracts in football—a contact sport with an increasing reputation for permanent head injuries—usually only provide injury protection for the season in which the injury occurs. Lawsuits and lobbying surrounding workers' compensation issues for athletes are on the rise.

Public Influence

Given the public nature of professional sports, decisions about whether and to discipline a player are uniquely subject to media and fan scrutiny. A recent illustration: a video showing NFL player Ray Rice battering his then-fiancee led to a major media controversy and strong criticism of the team's imposed sanction (a two-game suspension). The NFL Commissioner defended the discipline as consistent with other instances, but the incident remains controversial. Rice's suspension was increased from two games to the entire season when the video was released to the public. This led to further criticism that the NFL disciplinary methods were too arbitrary and easily swayed by outside forces.

In conclusion, the relationship between professional athletes and their employers is largely separate from standard U.S. employment law. While athletes are subject to the same employment-related laws as everyone else, the leaguewide collective-bargaining system and the unique, highly specialized skills athletes possess creates a contract-based that in essence comprises its own laws.

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