

Sports & Esports Alert

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Leagues, Teams and Athletes Grapple With Health and Compensation Challenges as Sports Reactivate

As the sports world starts or restarts seasons stalled by the COVID-19 pandemic, leagues, teams and athletes are grappling with new, practical challenges and the ripple effect that missteps can cause. Principal among the issues they are working to address are concerns about players' health and compensation as play begins with various configurations of "bubbles" and shortened seasons.

As the employers of thousands of athletes, leagues and teams across the sports world face potential liability in a variety of COVID-19-related areas, from medical to contractual. Many of the key issues are subject to the collective bargaining agreements (CBAs) between the leagues and their players.

But the CBAs in force when the pandemic hit were not drafted with the possibility of a highly contagious virus shutting down sports for months in mind.

In this alert, the next in our "Next Opening Day" series on the impact of COVID-19 on the sports industry, Loeb Sports explores how leagues, teams and athletes are working to protect the health of players and staff, and the financial impact of those efforts, as play starts up again.

New and Amended CBAs

In late July, the National Football League and the NFL Players Union finalized comprehensive CBA renegotiations to address COVID-19-related issues and help ensure a scheduled Sept. 3 start for the league's 2020-21 regular season. The parties also agreed to cancel all preseason games to reduce the risk of infection for players. The National Basketball Association and the NBA



Players Association also agreed in late June to adopt revisions to the existing CBA to cover a variety of issues, as a precursor to restarting the season in the league's "bubble" in Orlando, Florida.

National Hockey League team owners and the NHL Players Association took the opportunity to negotiate and approve a new CBA to replace the existing labor agreement that was set to expire in 2022. The new deal not only supplants the final two years of the previous CBA, but extends it at least four more seasons, until 2026. Among the issues the CBA covers are safety protocols for completing the 2019-20 season and the economic impact of the pandemic on players and owners.

These new or amended CBAs cover a variety of legal issues, including how players will be compensated if they decide to opt out of the season or the season is canceled or shortened, procedures to follow if a player tests positive for the virus, and penalties for refusing to take a COVID-19 test or follow safety precautions. Of course, additional legal questions are likely to arise once the seasons get underway.

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Athlete Health Concerns

Unsurprisingly, staying healthy is a primary concern for players, particularly in light of the potential long-term damage COVID-19 can cause to an individual's lungs and other organs. Team and league policies—and penalties for violating those policies—are aimed at ensuring compliance and consistent enforcement.

Policies. Teams across multiple sports have enacted strict testing, quarantining and personal protective equipment policies for players and staff as they embark on preseason training and play regular season games. According to the NFL, players reporting to training camp had to pass three COVID-19 tests over a four-day period before they were allowed to take part. Players were then tested daily for the first two weeks and every other day after that.

The league's amended CBA also defines "High-Risk COVID-19 Conduct" as going to certain venues where more than a specified number of people have gathered. These "no-go" areas include nightclubs and bars with more than 10 people and house parties with more than 15 people.

The NFL expects testing protocols and other policies to evolve during the season as more is learned about the virus and the effectiveness of the efforts to safeguard player and staff health is tested.

Noncompliance. Failure to follow team and league guidelines can result in serious penalties for players. For example, under the NFL's amended CBA, players who refuse to take a COVID-19 test could be hit with a hefty \$50,000 fine. Players who go to venues or events with too many people can be fined a week's pay and suspended for up to four games. More flagrant flouting of the rules can certainly result in stiffer penalties meted out by teams.

The NFL's CBA also treats players who are diagnosed with "football-related" COVID-19—diagnosed with the virus at any point during the time frame between the pre-entry testing period and either their exit physical or five days after their last game of the season—as having a football-related injury and entitled to the rights and benefits under the CBA while they are unable to train, practice or play. These benefits can include workers' compensation, disability pay and "injury protection," among others. But a player can lose these protections if his team can prove

that the positive test resulted from engaging in activities defined as High-Risk COVID-19 Conduct.

For many athletes, the new normal will take some adjusting to, especially those playing in environments that are anything but normal. The NBA suspended play in March and resumed on July 30. The teams are now finishing their season in a closed environment at the Walt Disney World Resort, where athletes are living, practicing and playing the rest of the games.

At least three players have reportedly breached NBA COVID-19 protocols when they either left the bubble after arriving in Orlando or failed to adhere to quarantine requirements, according to the *Sporting News*. All three players had to complete a 10-day quarantine for those who leave and return to the bubble, and critics wonder whether the strict protocols are sustainable for the remainder of the season and how further bubble breaches followed by mandated quarantining will affect team rosters and, ultimately, the season.

Of course, lack of compliance can have an impact far beyond the players and their teams; for example, the recent coronavirus outbreak among Miami Marlins players in which 17 players tested positive for COVID-19 threw a serious wrench in Major League Baseball's plans. NBC reported that the outbreak possibly stemmed from one or more Marlins players leaving the team's hotel during the preseason in Atlanta. The Marlins opened the season days later in Philadelphia against the Phillies. The Marlins' situation not only resulted in teamwide testing, several postponed Marlins games and questions about the safety of spaces used by the Marlins (a nearly unanimous vote by Washington Nationals players resulted in them not traveling to Marlins Park in Miami), but it also caused a ripple effect across the MLB, as the league scrambled to reset schedules for the already-condensed 60-game season.

Compensation and Opting Out

Some players, particularly those with underlying medical conditions, are opting out of the season entirely rather than risking their health. The major professional leagues have differing approaches to players sitting out due to COVID-19.

Stipends. The NFL reported at the beginning of August that nearly 50 players had opted out of the season so

far. Under the NFL's CBA, players who decide to opt out of the 2020 season fall into two categories: high risk and voluntary.

A player is considered high risk if he has a confirmed diagnosis of at least one of the 15 underlying conditions designated by the Centers for Disease Control and Prevention (CDC) that could make an individual susceptible to developing a severe form of COVID-19. High-risk players who opt out, including undrafted rookies, will receive a \$350,000 stipend, which will not be considered a salary advance against future compensation earned from playing in the NFL.

Players, not including undrafted rookies, who voluntarily opt out will receive a \$150,000 stipend, which will be considered a salary advance against any future money earned from playing in the league.

Salaries. For NFL players, opting out freezes their contracts for 2020, including their salaries and bonuses, which will resume in 2021. Additional years in the contract will be tolled by one year.

NFL players opting out also impacts their respective teams' salary caps. A player's remaining 2020 compensation and bonus proration will be removed from his team's 2020 salary cap and be shifted to 2021. This may prove beneficial for some NFL teams because their salary cap savings can be carried over into 2021.

Other leagues have different approaches to compensation. The MLB, for example, allows players who are deemed high risk to opt out of playing without losing their prorated season salaries and service time. MLB players who are not considered high risk can also opt out but would forfeit their salaries and not accrue service time.

In the NBA, players who opt out lose a portion of their salary for each game missed, unless they fall into either the "excused" or "protected" player category. Players who believe they are at a higher risk for virus-related serious illnesses can request excused status, and a panel of medical experts will evaluate the request. Teams can also designate players who are at a higher risk for COVID-19-related illness as protected players.

The league also allows teams to designate and contract with replacement players for the ones who opt out. The replacement player is entitled to a contract for the rest of

the season and will become an unrestricted free agent at season's end. The player being replaced is no longer eligible to participate in the remainder of the 2020 season.

While the NHL categorizes players who want to opt out of the 2020 season as players who have a health concern that increases the risks that COVID-19 poses, or a family member with such a health concern, and players who do not have a preexisting health concern, under the league's Return to Play Plan, players are not required to state a reason if they chose to opt out. The small group of players who did choose to opt out before the July 13 deadline will suffer no penalties, suspensions or fines, but they will not receive their salaries for participating in the Stanley Cup playoffs and are not entitled to playoff-related performance bonuses.

Requests denied. Not all opt-out requests are granted, which has sparked controversy. The Women's National Basketball Association refused to let Washington Mystics star forward Elena Delle Donne sit out the season because she has Lyme disease, which is not on the CDC's list of underlying conditions that can make COVID-19 worse. In the WNBA, opting out for a "high risk" medical reason allows players to keep their salaries, but opting out for other reasons does not.

The WNBA, which is playing a shortened season in its own Florida bubble, and the WNBA's Players Association jointly appointed a panel of three physicians to review medical opt-out requests. There is no appeals process from the panel's decisions, noted ESPN. Observers have questioned the wisdom of putting these decisions in the hands of just three physicians.

The Mystics later announced that Delle Donne, the league's reigning MVP, would be paid her salary even if she opted out of playing, according to ESPN.

Force majeure. The NFL's CBA includes no force majeure, or "act of God," provision that would relieve team owners from their contractual obligations if the season is canceled due to uncontrollable circumstances like a pandemic.

The NBA's CBA does have a force majeure clause, which allows the league to reduce player salaries in certain circumstances. As ESPN reported, the league began withholding 25% of each player's pay starting May 15, after the league suspended its season in March when a player tested positive for COVID-19.

What Loeb Sports Is Watching

The legal implications of this unprecedented public health crisis on sports continue to evolve as leagues and teams work to protect athletes—and their investments.

As the 2020 sports seasons progress, potential new practical, legal and liability issues will arise across sports. Litigation over these issues will likely follow, as all the stakeholders—leagues, teams and athletes—grapple with the uncertainty of how the existing legal and contractual frameworks will accommodate those issues.

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