

Chicago Daily Law Bulletin®

VOLUME 165, NO. 69

LAW BULLETIN MEDIA

Use of athletes' health data looms large for players, leagues

The collection of data from professional athletes has sparked ongoing discussion about the ownership and use of that data, including the rights of athletes to monetize their own information and how to protect their privacy. But as the practice of gathering player data – on and off the field – becomes more accepted, and the methods of collecting and using the data more sophisticated and more widespread, a new area of concern is emerging — the use of athlete data in contract negotiations and labor relations.

All four major U.S. professional sports teams collect athlete data for a variety of purposes ranging from training, coaching and injury prevention, to fan and audience engagement. Teams within the Big Four major sports leagues track athletes' performance and health in varying degrees.

The positive impact of the collection and use of performance and health data is that it contributes to better, more individualized training and coaching, and to keeping athletes healthy and in top playing condition. The potential negative side for athletes, however, is the use of biometric data to predict player longevity and as leverage in contract and salary negotiations.

In fact, if the rumblings and rumors are true, ownership and use of athlete data has the potential to become a big issue when collective bargaining time rolls around again for both the MLB and NFL.

The NFL has been at the forefront of both the collection and use of player data and in attempting to address the privacy and ownership issues surrounding such data.

The league first obtained players' consent to wear sensors or tracking devices in games and practices in 2011 as part of the current collective bargaining agreement. The language of the 2011 collective bargaining agreement provided that the tracking devices were "for the purpose of information regarding the performance of NFL games, including players' performances and movements, as well as medical and other player safety-related data." The agreement also provided "[b]efore using sensors for health or



SPORTS MARKETING PLAYBOOK

DOUGLAS N. MASTERS and SETH A. ROSE

DOUGLAS N. MASTERS is a partner at Loeb & Loeb LLP, where he litigates and counsels clients primarily in intellectual property, advertising and unfair competition. He is co-chair of the firm's intellectual property protection group and he can be reached at dmasters@loeb.com.

SETH A. ROSE is a partner at the firm, where he counsels clients on programs and initiatives in advertising, marketing, promotions, media, sponsorships, entertainment, branded and integrated marketing, and social media. He can be reached at srose@loeb.com.

medical purposes, the NFL shall obtain the NFLPA's (National Football League Players' Association) consent."

The league started gathering player performance data, known as Next Gen Stats, through the use tracking sensors in the players' shoulder pads during the 2015 season. The sensors track metrics like a player's speed, position on the field and the distance between an offensive player and his defender, to name a few.

The league gave team general managers post-game access to their own players' data in 2016 and, in a move that has been somewhat controversial, just this past season put into effect an open data policy that included sharing the player game data with all the teams after every game.

The Next Gen Stats initiative also makes detailed player performance data available to

fans, slicing and dicing the data to provide sophisticated stats, such as: speed of ball carrying (the maximum speed in miles per hour a player achieves on a given play when carrying the ball on offense or special teams); time to throw ("average time elapsed from the time of snap to throw on every pass attempt"); quarterback "aggressiveness;" ("the amount of passing attempts a quarterback makes that are into tight coverage, where there is a defender within a yard or less of the receiver at the time of completion or incompleteness"); and rushing "efficiency," ("calculated by taking the total distance a player traveled on rushing plays as a ball carrier according to Next Gen Stats (measured in yards) per rushing yards gained"), to name just a few of the dozens of stats available on the site.

While the Next Gen Stats initiative makes a mountain of performance data available to fans, it's only a fraction of the data that the league collects. Teams also collect their own data. Some teams have installed the same sensor technology in their own practice facilities to capitalize on the data, according to ESPN.com.

Next Gen Stats also don't involve player biometric data — the next frontier in data — and seemingly where the focus of players and their unions lie.

In 2017, the NFLPA became the first professional sports players association to partner with a wearable technology company when it named Boston-based biometrics company WHOOP its official licensed "recovery wearable."

The WHOOP arm and wrist bands monitor performance data, sleep and physical recoveries of players who opt into the program. The partnership made a point of ensuring that the league's more than 2,000 players would own and control their individual data and are able to commercialize their own individual data through the NFLPA's group licensing program.

NFL players are not required to participate and, according to WHOOP, players can choose between 27 different privacy settings

on the tracker to decide who gets to see their data.

MLB teams also use WHOOP technology. In fact, baseball was the first of the Big Four professional leagues to sanction the wearing wearable biometric trackers — specifically the WHOOP bands — during game play, according to WHOOP.

Baseball has always been a game of statistics and data, so it's no surprise that the MLB joined the wearable tech revolution early. In fact, the league has been tracking players' performance since 2015 through the league's data collection initiative called Statcast.

MLB teams also use a smart throwing sleeve called Motus Throw to track pitchers' arm movements to help protect them from injury. The Motus sleeve, one of the leading wearable training devices that measures elbow stress, arm speed and shoulder rotation, is one of the few performance

measurement devices allowed for in-game use in MLB.

Prior to the 2017 announcement that players could — but are not required to — wear the WHOOP tracker in competitive play, MLB and WHOOP partnered on “the largest performance study in the history of pro sports,” according to WHOOP.

“More than 200 players from 28 minor league teams spanning [nine] different organizations ... wore WHOOP Straps continuously around the clock, with the exception of when they took the field for games.” Collecting data for an average of 21 hours per day, WHOOP described the study as “revealing findings on the effect of travel, correlations between recovery and in game performance and injuries. It also demonstrated that players wanted to voluntarily wear WHOOP to better understand their bodies.”

MLB permits but doesn't require its play-

ers to wear the WHOOP bands. According to WHOOP, MLB players can also choose between the more than two dozen privacy settings to determine what data is shared and what remains private.

According to ESPN.com, the agreement also provides that WHOOP has no ownership rights to the data. The player and the team can both use the data to identify trends. Any commercial or public use of the player data requires both the player and the team to consent.

So where does the use of technology to collect athlete data leave players, teams and leagues?

With more questions than answers, it seems.

And perhaps a looming sense of the inevitable need to deal with a situation in which the rapid development and deployment of technology has outpaced any legal and regulatory framework that exists.