

# Sports Litigation Alert

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## Domestic Violence and Professional Sports: Training Could Help Teams Stay Ahead of the Game

By Michael Gregg

Following a rash of domestic violence incidents—crystallized by a video of former Baltimore Ravens running back Ray Rice knocking out his then-fiancé—some professional sports leagues have implemented tougher personal conduct policies to discourage and prevent similar conduct. While the four major professional sports leagues have broad authority to impose discipline under the respective collective bargaining agreements, individual teams should also promote the values upon which these policies are based. Not only are such steps expressly called for in certain league policies, failing to do so could negatively impact league and team brands, lessen the confidence of business partners, and result in legal liability.

### **Balancing an Organization’s Business Interests with Individual Privacy Rights**

Imposing discipline for personal off-duty conduct requires a balancing of an individual’s right to privacy against an organization’s business interests. The California Constitution, for example, provides that the right to privacy is an inalienable right and this provision applies to private as well as government actors. Disciplining employees for extramarital affairs, unorthodox lifestyles or radical social beliefs, for example, may be unjustified, even if such conduct does not reflect an organization’s image.

### **Federal and State Statutes Extend Protections to Off-duty Conduct**

Federal and state statutes may also limit an employer’s ability to discipline employees for off-duty conduct. Some states require that an employer demonstrate a nexus between the employee’s conduct and the employer’s business in order to justify discipline for off-duty conduct. With certain limitations, 21 states also protect an employee’s right to bring firearms onto company property. California Labor Code Section

432.7 also precludes an employer from disciplining an employee because of “any record of arrest or detention that did not result in conviction” or “a conviction that has been judicially dismissed or ordered sealed pursuant to law.” In addition, the EEOC takes the position that an employer may violate Title VII of the Civil Rights Act of 1964 for refusing to hire or disciplining an employee because of an arrest or conviction, unless the employer can show that the underlying conduct is job-related and consistent with business necessity.

### **The CBAs of The Four Major Professional Sports Leagues Give The Commissioners Broad Disciplinary Authority**

While there are certain legal obstacles to disciplining employees for off-duty conduct, the four major professional sports leagues, through collective bargaining, have retained broad authority to discipline players, irrespective of whether such conduct occurs on-duty or off-duty.

The United States Court of Appeals for the Second Circuit recently held that the NFL Commissioner’s authority to discipline players under the NFL’s CBA is “especially broad.” *National Football League Management Council v. National Football League Players Association*, 820 F.3d 527, 532 (2d Cir. 2016). The Second Circuit’s reasoning was based on Article 46 of the NFL’s CBA, which gives the Commissioner authority to impose discipline for “conduct detrimental to the integrity of, or public confidence in, the game of professional football.”

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The CBAs of other major professional sports leagues give the respective Commissioners similar broad disciplinary authority. Major League Baseball's CBA gives the Commissioner and teams authority to discipline players for "just cause for conduct that is materially detrimental or materially prejudicial to the best interests of Baseball." Similarly, the National Basketball Association Constitution and By-Laws provides that the NBA Commissioner has the power to discipline players who "in his opinion ... have been guilty of conduct that does not conform to standards of morality or fair play, that does not comply at all times with all federal, state, and local laws, or that is prejudicial or detrimental to the Association." Finally, the National Hockey League's CBA gives the Commissioner authority to discipline players for off-ice conduct whenever the Commissioner determines that a player "has been or is guilty of conduct (whether during or outside the playing season) that is detrimental to or against the welfare of the League or the game of hockey."

With some variations, the CBAs of the four major professional sports leagues give the Commissioners especially broad powers to impose discipline for off-duty conduct.

### **A Trend Towards Tougher Personal Conduct Policies**

Both MLB and the NFL have implemented tougher personal conduct policies. Generally, these policies focus on domestic violence, sexual assault and child abuse.

The NFL's personal conduct policy applies to "everyone who is part of the league." Similarly, MLB's policy applies to everyone employed by a major league or minor league team and the Commissioner's office.

Prohibited conduct under the NFL's personal conduct policy is very broad. It encompasses the obvious such as domestic violence, child abuse, and sexual assault, but also includes more ambiguous conduct, especially within the context of professional football, such as "threatening behavior toward another employee," "harassment, or similar forms of intimidation" and "disorderly conduct." Prohibited conduct under MLB's personal conduct policy is more limited. MLB's policy gives the Commissioner authority to discipline a player who "commits an act of domestic violence, sexual assault or child abuse for just cause."

Under the NFL's policy, failure to cooperate in an investigation or to be truthful in responding to questions can be separate grounds for disciplinary action.

The policy also provides that the NFL can compel an employee to cooperate in its investigations even when he or she is the target of a pending law enforcement investigation or proceeding. Similarly, under MLB's policy, players and the Player's Association are required to cooperate in investigations.

Discipline under the NFL's personal conduct policy depends on the nature of the violation and the record of the employee. Possible discipline includes a fine, suspension, community service or banishment from the league. However, violations that involve assault (sexual or otherwise), battery or domestic violence are subject to a minimum suspension of six games without pay. A second offense involving such conduct results in permanent banishment from the NFL. There is no minimum or maximum penalty under MLB's policy—the discipline will be based on the severity of the conduct.

While the NBA Constitution and By-Laws gives the Commissioner broad authority to discipline players, the NBA's CBA provides a more specific rule for domestic violence. The CBA authorizes suspensions for domestic violence only when a player is convicted or pleads no contest to a violent felony. If so, the player will be suspended for a minimum of ten games.

The changes made by MLB and the NFL to their personal conduct policies show a clear trend towards tougher policies.

### **The Importance of Training**

As professional sports leagues move towards more robust personal conduct policies to prevent and address domestic violence, individual teams also have an incentive to prevent such conduct.

Teams should make sure their players are trained on the applicable policies. In particular, the NFL's policy mandates that teams "promptly report any matter that comes to their attention ... that may constitute a violation" of the policy. Similarly, MLB's policy requires that players be "provided education in English and Spanish about domestic violence, sexual assault and child abuse at regular intervals." Thus, teams should ensure that players receive ongoing training on the types of conduct that may constitute a violation of the policy. Training could also highlight the resources available to players.

Teams should also consider providing training to their non-player personnel as well. Indeed, the personal

conduct policies of MLB and the NFL are not limited to players. In fact, the NFL's policy expressly provides that teams are "expected to educate their employees on this obligation to report" and "failure to report an incident will be grounds for disciplinary action." The NFL's policy also provides that "ownership and club or league management have traditionally been held to a higher standard and will be subject to more significant discipline when violations of the Personal Conduct Policy occur." Similarly, the NBA Constitution and By-Laws gives the Commissioner the authority to suspend and/or fine team officers, managers, coaches, and employees who in "his opinion ... [is] guilty of conduct prejudicial or detrimental to the Association."

Given the importance of the subject matter and the potential consequences for violating the respective

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personal conduct policies, including league banishing for NFL players, individual teams have an incentive to promote the values upon which these policies are based.

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