

2018

## Head to Head: The NFL Concussion Scandal and an Argument for OSHA Regulation

Kirstie Brenson

Follow this and additional works at: <https://chicagounbound.uchicago.edu/uclf>

---

### Recommended Citation

Brenson, Kirstie (2018) "Head to Head: The NFL Concussion Scandal and an Argument for OSHA Regulation," *University of Chicago Legal Forum*: Vol. 2017 , Article 23.

Available at: <https://chicagounbound.uchicago.edu/uclf/vol2017/iss1/23>

This Comment is brought to you for free and open access by Chicago Unbound. It has been accepted for inclusion in University of Chicago Legal Forum by an authorized editor of Chicago Unbound. For more information, please contact [unbound@law.uchicago.edu](mailto:unbound@law.uchicago.edu).

# Head to Head: The NFL Concussion Scandal and an Argument for OSHA Regulation

Kirstie Brenson<sup>†</sup>

## I. INTRODUCTION

In recent years, the National Football League (NFL) has ensnared itself in scandal. At the center of the controversy is the concern that teams often allow, or even require, players to return to the field too quickly after suffering a concussion or head trauma. Intertwined with this is a competing concern: how should NFL teams care for current and former players suffering from concussion-related injuries sustained during their time playing for the NFL?<sup>1</sup> The NFL has taken some steps to change its rules in an attempt to prevent concussions from happening in the first place. While these measures seem to be somewhat effective in reducing the rate of concussion,<sup>2</sup> as of 2015, NFL players were still suffering an average of 0.43 concussions per game, and the number of reported concussions suffered in the 2016–17 season was on par with the average number of reported concussions suffered in the past four seasons.<sup>3</sup>

Concerns regarding concussions suffered on the field and post-concussion treatment were recently raised in a class action lawsuit brought on behalf of retired professional football players.<sup>4</sup> The suit, which settled in April 2015, alleged claims of negligence and fraud and sought

---

<sup>†</sup> A.B. 2012, The College of William & Mary; J.D. Candidate 2018, The University of Chicago Law School. My thanks and gratitude go to Professor John Rappaport for his thoughtful suggestions and guidance, and to the past and present staff and board of *The University of Chicago Legal Forum*.

<sup>1</sup> Bryan Lipsky, Note, *Dealing with the NFL's Concussion Problems of Yesterday, Today, and Tomorrow*, 18 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 959 (2008).

<sup>2</sup> See Jon Hyman, *OSHA and Pro Sports—Are Concussions the NFL's Black Lung?*, LEXISNEXIS LEGAL NEWSROOM LAB. & EMPL. L. BLOG (Mar. 18, 2015), <https://www.lexisnexis.com/legalnewsroom/labor-employment/b/labor-employment-top-blogs/archive/2015/03/18/osha-and-pro-sports-are-concussions-the-nfl-s-black-lung.aspx> [<https://perma.cc/SL6J-5U5R>] (noting that the rate of concussion fell twenty-five percent from the 2013 season to the 2014 season).

<sup>3</sup> Seth Walder, *NFL Releases Its Concussion Data—How This Season Compares to Past Ones*, NY DAILY NEWS (Jan. 26, 2017), <http://www.nydailynews.com/sports/football/nfl-releases-concussion-data-compares-seasons-article-1.2956490> [<https://perma.cc/2CZB-V88S>].

<sup>4</sup> See *In re Nat'l Football League Players' Concussion Injury Litig.* (*NFL Concussion Litig.*),

declaratory relief, medical monitoring, and damages.<sup>5</sup> The settlement resulted in monetary relief for members of the class, the establishment of a baseline assessment program to test for cognitive decline, and the creation of an education fund to promote safety and injury prevention “for football players of all ages.”<sup>6</sup> In tandem with pressure from the public, the litigation also prompted the adoption of a set of basic safety principles known as the “NFL Game Day Concussion Protocol.”<sup>7</sup> These safety principles revised the protocol for post-injury care in the event of an on-field concussion.<sup>8</sup> Even so, these forms of relief fail to provide a solution to the underlying problem—a game and its rules that allow for and perhaps even promote injury-inducing play.

In light of the class action litigation and subsequent settlement, existing scholarship largely focuses on litigation strategy, affirmative defenses, and medical malpractice litigation. One line of analysis is conspicuously absent from discussion of the potential legal implications of the concussion scandal—occupational safety. The Occupational Safety and Health Administration (OSHA) was founded with the purpose of protecting employees from the dangers of hazardous workplaces.<sup>9</sup> This begs the question: what has OSHA done to ensure a workplace environment free from hazards for professional football players? This Comment will explore the possibility of OSHA regulation of professional football through analysis of statutory language and administrative opinions.

First, this Comment will present background information on the structure of the NFL and shed light on the history and context of its concussion scandal. This discussion will illuminate the health concerns inherent in football-related head trauma, thus providing justification for OSHA intervention. Next, the Comment will discuss OSHA, both in terms of its legislative purpose and its statutory authority. It will then consider whether OSHA’s jurisdiction reaches professional football. For OSHA to properly assert jurisdiction over NFL teams, there must be an employment relationship between NFL players and their teams, and OSHA must be able to show a violation of one of its clauses. As there is not a specific clause that concerns professional sports in the relevant legislation, OSHA must point to a violation of its general duty clause,

---

307 F.R.D. 351, 361–62 (E.D. Penn. 2015).

<sup>5</sup> *Id.* at 362.

<sup>6</sup> *Id.* at 366–69.

<sup>7</sup> *Id.*; see also Paul D. Anderson, *NFL to Enforce Concussion Protocol Violations*, NFL CONCUSSION LITIG. (July 26, 2016), <http://nflconcussionlitigation.com/?p=1900> [<https://perma.cc/L26J-PQ2K>].

<sup>8</sup> *Id.*

<sup>9</sup> *About OSHA*, OSHA., <https://www.osha.gov/about.html> [<https://perma.cc/M95D-QGDL>].

which acts as a catch-all. Finally, after demonstrating OSHA's jurisdiction over professional football, the Comment will argue that OSHA can and should regulate professional football as an industry.

## II. PROFESSIONAL FOOTBALL

The NFL was founded in 1920 as the American Professional Football Conference.<sup>10</sup> The unifying goal was to create a league of football teams in which all members followed the same rules.<sup>11</sup> Creation of the league was a reaction to three problems: “dramatically rising salaries; players continually jumping from one team to another following the highest offer; and the use of college players still enrolled in school.”<sup>12</sup> The league changed its name to the American Professional Football Association in late 1920, and then to the National Football League on June 24, 1922.<sup>13</sup>

This section begins by describing the history and structure of the NFL, with brief discussion of various league policies. Each of these league policies or governing documents have the potential to contribute to a solution to the NFL's concussion problem, but none sufficiently address the problem. This section then provides background information on the NFL's concussion scandal that illuminates the NFL's controversial stances on football-related head trauma over the years and illustrates the need for a stronger solution. This discussion incorporates information about litigation brought against the NFL as a result of football-related head trauma, as well as current league policies that purport to ameliorate the concussion problem.

### A. The Structure of the NFL

To understand OSHA's potential to regulate NFL teams, it is first necessary to understand the league's structure. The NFL is a trade association comprised of 32 teams.<sup>14</sup> The Constitution and Bylaws of the

---

<sup>10</sup> NFL, OFFICIAL 2016 NFL RECORD & FACT BOOK, 97TH SEASON 355–56 (2016), <http://www.nfl.com/static/content/public/photo/2015/07/21/0ap3000000502939.pdf#page=357> [https://perma.cc/9EMN-KSVM].

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 356.

<sup>14</sup> Patrick Doyle, *Why is the NFL a Nonprofit?*, PUBLICSOURCE, Oct. 13, 2014, <http://www.witf.org/news/2014/10/why-is-the-nfl-a-nonprofit.php> [https://perma.cc/H3QN-M3JW]. The NFL has renounced its 501(c)(6) tax-exempt status; this renunciation does not have any bearing on the structure of the NFL for the purposes of this Comment. See Joe Pinsker, *Why the NFL Decided to Start Paying Taxes*, ATLANTIC (Apr. 28, 2015), <http://www.theatlantic.com/business/archive/2015/04/why-the-nfl-decided-to-start-paying-taxes/391742/> [https://perma.cc/2ERM-64LF].

National Football League (“NFL Constitution”) governs the relationship between the NFL and its member teams; this document grants rights and assigns responsibilities to the teams.<sup>15</sup>

Players are drafted directly by individual teams and sign a standard contract with the NFL that includes a rider for the specific team.<sup>16</sup> Among other things, player contracts include clauses stating that the parties to the contract agree to be bound to the terms of the NFL Constitution.<sup>17</sup> The NFL Constitution is ambiguous in its treatment of the employment status of players; at one point, the document refers to players as employees of teams, but elsewhere in the document players and employees are differentiated in treatment.<sup>18</sup> An employment relationship is a prerequisite to OSHA jurisdiction, as discussed in greater detail below. Accordingly, the NFL Constitution’s ambiguous references to the employment status of NFL players illuminate a controversy central to this argument: are NFL players employees of the teams for which they play?

There is very little within the NFL Constitution that concerns safety and injury protocol. The document requires home teams to provide a physician and ambulance at each game for the use of both teams, and the NFL Catastrophic Loss Program provides league-wide coverage for all NFL players at all times for on-field and off-field injuries.<sup>19</sup> The Catastrophic Loss Program focuses on injuries not associated with concussions, as the relevant bylaw specifically mentions paraplegia, quadriplegia, hemiplegia, monoplegia, total severance of limbs, and total loss of sight.<sup>20</sup> Beyond this, there is little to no mention of safety or injury concerns, which indicates that the NFL neither pays sufficient attention to the safety concerns presented by head trauma nor provides sufficient protections for NFL players.

NFL players are members of the National Football League Players Association (NFLPA), and so players’ relationships with their member teams and the NFL itself are governed by the Collective Bargaining

---

<sup>15</sup> NFL, CONSTITUTION AND BYLAWS OF THE NATIONAL FOOTBALL LEAGUE (2006), [http://www.nfl.com/static/content/public/static/html/careers/pdf/co\\_.pdf](http://www.nfl.com/static/content/public/static/html/careers/pdf/co_.pdf) [<https://perma.cc/S4TU-PDPR>].

<sup>16</sup> See, e.g., *NFL Player Contract Between Arian Foster and Houston NFL Holdings*, U.S. SEC. & EXCHANGE COMMISSION (Mar. 6, 2012), [https://www.sec.gov/Archives/edgar/data/1573683/000104746913009713/a2216998zex-10\\_3.htm](https://www.sec.gov/Archives/edgar/data/1573683/000104746913009713/a2216998zex-10_3.htm) [<https://perma.cc/W475-3AJC>] [hereinafter *NFL Player Contract*]; see also NFL, NFL PLAYERS ASSOCIATION COLLECTIVE BARGAINING AGREEMENT 256 (Aug. 4, 2011), <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf> [<https://perma.cc/6GB5-W3QK>] [hereinafter COLLECTIVE BARGAINING AGREEMENT].

<sup>17</sup> NFL, *supra* note 15, at 11.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 98, 2002–10.

<sup>20</sup> *Id.* at 2002–11.

Agreement (CBA).<sup>21</sup> The current CBA is effective from August 4, 2011 until the last day of the 2020 league year.<sup>22</sup> The CBA is a fairly comprehensive document, but includes surprisingly few provisions related to on-field injuries. Of the relevant provisions, the CBA provides for an injury grievance system, workers' compensation policies, and disability plans for former players—including neuro-cognitive disability benefits—but does not mention injury prevention.<sup>23</sup> Also of note is the fact that while team physicians are paid by the member team, their primary duty is to the player-patient—this may suggest the existence of perverse incentives.<sup>24</sup>

## B. Concussion Scandal

At the heart of this Comment is the NFL's concussion scandal. Over the past few decades, and especially in recent years, football-related head trauma has become increasingly prevalent. Reports of medical conditions from former players, coupled with increased information about the long-term effects of repeated concussions, have changed the way that many look at the NFL. This section describes the history of the concussion scandal, as well as recent litigation and current league policies, to provide context for the argument that follows.

### 1. History of the scandal

In January 1994, during the 1993 season NFC Championship game, Dallas Cowboys quarterback Troy Aikman suffered a concussion when another player's knee made contact with his head.<sup>25</sup> He was hospitalized that night as a result of the injury.<sup>26</sup> Later that year, Chicago Bears fullback Merrill Hoge decided to retire from professional football.<sup>27</sup> Hoge had suffered several concussions during his career and just two weeks earlier had taken a knee to the head that left him temporarily unable to recognize his wife or brother.<sup>28</sup>

---

<sup>21</sup> COLLECTIVE BARGAINING AGREEMENT, *supra* note 16, at xiv. For more information on the NFLPA, see NFLPA, <https://www.nflpa.com> [<https://perma.cc/84YV-VWB2>].

<sup>22</sup> COLLECTIVE BARGAINING AGREEMENT, *supra* note 16, at 253.

<sup>23</sup> *Id.* at 176, 193, 237, 247.

<sup>24</sup> *Id.* at 171.

<sup>25</sup> Lauren Ezell, *Timeline: The NFL's Concussion Crisis*, PBS FRONTLINE (Oct. 8, 2013), <http://www.pbs.org/wgbh/pages/frontline/sports/league-of-denial/timeline-the-nfls-concussion-crisis/> [<https://perma.cc/KM46-8WWE>].

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

In response to these instances of head trauma suffered by high-profile players, the NFL created the Mild Traumatic Brain Injury (MTBI) Committee. The NFL Commissioner appointed Dr. Elliot Pellman as Chair of the Committee, despite his lack of experience in the field of brain injury.<sup>29</sup> In December 1995, Dr. Pellman said in an interview with *Sports Illustrated* that, “Concussions are part of the profession, an occupational risk,” and “[v]eterans clear more quickly than rookies. . . . They can unscramble their brains a little faster.”<sup>30</sup> The MTBI Committee was and remains highly controversial; for years, it published findings in direct contradiction to those of other organizations, such as the NCAA, the Second International Conference on Concussion in Sport, and the American Academy of Neurology.<sup>31</sup>

In the following years, additional players made public their concerns about concussions suffered during their time at the NFL. Throughout this time, the science and medical information regarding the short and long-term effects of concussion and head trauma developed. One source of this information was the American Academy of Neurology, which published its findings that “[r]epeated concussions can cause cumulative brain injury in an individual over months or years.”<sup>32</sup>

The NFL suffered a blow in October 1999 when, for the first time, the NFL Retirement Board ruled that head injuries a former player suffered while playing had rendered him disabled.<sup>33</sup> The board’s ruling was not made public until reporters later uncovered it; the ruling and coverage suggest that “the league should’ve known there was a link between football and brain damage” as early as 1999.<sup>34</sup> The revelation of the ruling cast the NFL in a particularly bad light, as it demonstrated that the NFL Retirement Board had “awarded disability payments to at least

---

<sup>29</sup> *Id.*

<sup>30</sup> Michael Farber, *The Worst Case*, SPORTS ILLUSTRATED (Dec. 19, 1994), <http://www.si.com/vault/1994/12/19/132920/the-worst-case-doctors-warn-that-repeated-concussions-can-lead-to-permanent-brain-dysfunction> [<https://perma.cc/CJF4-RSV4>].

<sup>31</sup> Peter Keating, *Doctor Yes*, ESPN MAGAZINE (Nov. 6, 2006), <http://www.espn.com/espnmag/story?id=3644940> [<https://perma.cc/Z8JH-9K6F>]. Most relevant here is the MTBI Committee’s official finding that returning to play after a concussion “does not involve significant risk of a second injury either in the same game or during the season.” At the time, several organizations, including those listed above, had published their own studies indicating the opposite. *Id.*

<sup>32</sup> Ezell, *supra* note 25. In tandem with its findings, the American Academy of Neurology circulated guidelines for sports players returning to play after a concussion. The NFL rejected these guidelines, claiming, “[w]e see people all the time that get knocked out briefly and have no symptoms.” See Barry Petchesky, *A Timeline of Concussion Science and NFL Denial*, DEADSPIN (Aug. 30, 2013), <http://deadspin.com/a-timeline-of-concussion-science-and-nfl-denial-1222395754> [<https://perma.cc/NT4A-7CT3>].

<sup>33</sup> Ezell, *supra* note 25.

<sup>34</sup> *Id.*

three former players after concluding that football caused their crippling brain injuries—even as the league’s top medical experts for years consistently denied any link between the sport and long-term brain damage.”<sup>35</sup> Despite the evidence to the contrary, Dr. Pellman’s response was to dismiss the issue by claiming that the great majority of concussions resulted in only mild injury.<sup>36</sup>

In 2007, Dr. Pellman stepped down from his position as Chair of the MTBI Committee; his resignation came on the heels of increasing information about the long-term effects of repeated head trauma.<sup>37</sup> In 2002, a doctor examined the brain of a deceased NFL player and discovered the first evidence of the brain disease Chronic Traumatic Encephalopathy (CTE).<sup>38</sup> Doctors confirmed CTE was present in other deceased players, including some known to have suffered from dementia or depression, or to have committed suicide.<sup>39</sup> Dr. Pellman’s replacement, MTBI Chair Dr. Ira Casson, did little to remedy the situation and adamantly denied “any evidence of a link between head injuries in NFL players and depression, dementia, or any other long-term problems resulting in brain damage.”<sup>40</sup>

Even so, Commissioner Roger Goodell, appointed in 2006,<sup>41</sup> and the NFL began to take concerns regarding concussions and CTE more seriously. In June 2007, the NFL hosted a “Concussion Summit” and invited outside researchers to present on the dangers of concussions and head trauma. Later that year, the NFL issued a pamphlet on concussions that claimed existing research regarding the long-term effects of concussions was inconclusive.<sup>42</sup> The NFL admitted the link between concussions and long-term problems for the first time in December

<sup>35</sup> Steve Fainaru, *NFL Board Paid \$2M to Players While League Denied Football-Concussion Link*, PBS FRONTLINE (Nov. 16, 2012), <http://www.pbs.org/wgbh/frontline/article/nfl-board-paid-2m-to-players-while-league-denied-football-concussion-link/> [https://perma.cc/H52C-H2MG]. Even now, there is not much publicly available information regarding the Retirement Board’s decision to award disability benefits to those who had suffered head trauma on the field, and many players and their lawyers “were under the impression that the board did not approve any claims for chronic brain injuries related to football.” *Id.*

<sup>36</sup> Don Pierson, *Heads Up!*, CHICAGO TRIBUNE (Dec. 24, 1999), [http://articles.chicagotribune.com/1999-12-24/sports/9912240088\\_1\\_concussion-dr-elliott-pellman-helmets](http://articles.chicagotribune.com/1999-12-24/sports/9912240088_1_concussion-dr-elliott-pellman-helmets) [https://perma.cc/9642-NHTD].

<sup>37</sup> Ezell, *supra* note 25.

<sup>38</sup> *Id.*; see also Michael Kirk, *Dr. Bennett Omalu*, PBS FRONTLINE (Mar. 25, 2013), <http://www.pbs.org/wgbh/pages/frontline/sports/league-of-denial/the-frontline-interview-dr-bennet-omalu/> [https://perma.cc/SUU7-QL3B].

<sup>39</sup> Ezell, *supra* note 25.

<sup>40</sup> *Id.*

<sup>41</sup> *NFL Owners Elect Goodell as New Commissioner*, ESPN (Aug. 9, 2006), <http://www.espn.com/nfl/news/story?id=2543783> [https://perma.cc/T9WU-V99U].

<sup>42</sup> Ezell, *supra* note 25.



2009.<sup>43</sup> At that time, it also announced the institution of stricter return-to-play policies, aimed at mitigating the damage caused by concussions.<sup>44</sup>

## 2. Litigation and settlement agreements

In August 2011, former Atlanta Falcons safety Ray Easterling filed a lawsuit against the NFL.<sup>45</sup> Among other things, the suit claimed that “the NFL Parties allegedly breached a duty to NFL Football players to warn and protect them from the long-term health problems associated with concussions and that the NFL Parties allegedly concealed and misrepresented the connection between concussions and long-term chronic brain injury.”<sup>46</sup> Over the course of the next two years, a total of 242 lawsuits brought by and on behalf of current and former NFL players were filed against the NFL.<sup>47</sup> The Judicial Panel on Multidistrict Litigation consolidated the lawsuits into a multidistrict litigation in the Eastern District of Pennsylvania;<sup>48</sup> a class action of over 4,500 former players was formed.<sup>49</sup>

The lawsuit settled prior to trial.<sup>50</sup> The Amended Settlement Agreement required the NFL to pay monetary damages to class members and to establish an education fund to “promot[e] safety and injury prevention with respect to football players, including safety-related initiatives in youth football, the education of Retired NFL Football Players regarding the NFL CBA Medical and Disability Benefits programs, and other educational initiatives benefitting Retired NFL Football Players.”<sup>51</sup> Also included in the Settlement Agreement was the NFL’s denial of wrongdoing; the NFL “expressly den[ied] that they . . . have violated

---

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*; see also Plaintiffs’ Amended Master Administrative Long-Form Complaint at 1–7, *NFL Concussion Litig.*, 307 F.R.D. 351 (E.D. Penn. 2015) (No. 2:12-md-02323-AB).

<sup>46</sup> Class Action Settlement Agreement (As Amended) at 1, *NFL Concussion Litig.*, 307 F.R.D. 351 (No. 2:12-md-02323-AB).

<sup>47</sup> See *Court Documents*, NFL CONCUSSION LITIGATION, [http://nflconcussionlitigation.com/?page\\_id=18](http://nflconcussionlitigation.com/?page_id=18) [<https://perma.cc/R2FM-WXT3>] (listing lawsuits filed and consolidated in the MDL).

<sup>48</sup> Ezell, *supra* note 25; Plaintiffs’ Amended Master Administrative Long-Form Complaint, *supra* note 45.

<sup>49</sup> Few other lawsuits have been brought by or on behalf of NFL players in regards to the concussion scandal; of these suits, some are wrongful death and personal injury lawsuits, and some have been brought against the NFL Players Association or individual teams rather than against the NFL. These cases have either been dismissed or settled. See, e.g., Stipulation for Dismissal with Prejudice as to Roy Green’s Claims, *Green v. Arizona Cardinals Football Club*, No. 1422-CC00005-01 (Cir. Ct. City of St. Louis Nov. 24, 2015); *Ballard v. NFL Players Ass’n*, 123 F.Supp.3d 1161 (E.D. Mo. 2015) (dismissing claims).

<sup>50</sup> *NFL Concussion Litig.*, 307 F.R.D. at 361.

<sup>51</sup> Class Action Settlement Agreement, *supra* note 46, at 63.

any duty to, breached any obligation to, committed any fraud on, or otherwise engaged in any wrongdoing with respect to, the Class.”<sup>52</sup> Many commentators have voiced opinions that the settlement is inadequate; critics claim insufficiency in at least two respects: (1) the amount of money set aside to compensate class members, and (2) the fact that the NFL is only required to compensate past sufferers of CTE with no plans to address future victims of CTE.<sup>53</sup>

### 3. Current league policies

As the result of litigation and mounting public pressure, the NFL implemented various safety protocols aimed at reducing risk of head trauma to players.<sup>54</sup> These protocols range from a requirement that an independent medical professional be present on game day to educational initiatives meant to teach players about the risks associated with head trauma and advise safer ways to play the game.<sup>55</sup> The protocols also make recommendations as to the safest helmets to wear, although choice of helmet is ultimately left to the player.<sup>56</sup>

Of particular note is the NFL Sideline Concussion Assessment, a protocol to be followed in case of potential head trauma as a result of play.<sup>57</sup> It is designed for use at first sign of a concussion and requires serial testing for the purpose of tracking recovery.<sup>58</sup> Individual clubs keep the results of the assessment and also distribute results to the player and the team medical staff.<sup>59</sup> The protocol provides for proper emergency care following game-day injury and enumerates standards

---

<sup>52</sup> *Id.* at 86.

<sup>53</sup> See, e.g., Thomas Barrabi, *NFL Concussion Lawsuit Settlement: What ‘Frontline’ CTE Data Means for the Appeal Process*, INT’L BUS. TIMES (Sept. 18, 2015), <http://www.ibtimes.com/nfl-concussion-lawsuit-settlement-what-frontline-cte-data-means-appeal-process-2104528> [https://perma.cc/2HZQ-EZCR]; Blake Yagman, *NFL Concussion Settlement Draws Supreme Court Petition, WITH THE FIRST PICK* (Sept. 29, 2016), <http://withthefirstpick.com/2016/09/29/nfl-concussion-settlement-draws-supreme-court-petition/> [https://perma.cc/G836-SA62].

<sup>54</sup> See generally NFL PLAY SMART PLAY SAFE, <https://www.playsmartplaysafe.com/> [https://perma.cc/37XW-F4UL].

<sup>55</sup> *Id.*

<sup>56</sup> See Sam Borden, *Despite Risks, N.F.L. Leaves Helmet Choices in Players’ Hands*, N.Y. TIMES (Sept. 20, 2012), <http://www.nytimes.com/2012/09/21/sports/football/despite-risks-nfl-leaves-helmet-choices-in-players-hands.html> [https://perma.cc/FK2J-5NZV]; Taylor Soper, *Vicis Reveals Price, More Details About High-Tech Football Helmet That Reduces Brain Trauma*, GEEKWIRE (Jan. 11, 2016), <http://www.geekwire.com/2016/vicis-reveals-price-details-high-tech-football-helmet-reduces-brain-trauma/> [https://perma.cc/3JAQ-UUZ9].

<sup>57</sup> *Protecting Players: NFL Head, Neck and Spine Committee’s Protocols Regarding Diagnosis and Management of Concussion*, NFL PLAY SMART PLAY SAFE, <https://www.playsmartplaysafe.com/focus-on-safety/protecting-players/nfl-head-neck-spine-committees-protocols-regarding-diagnosis-management-concussion/> [https://perma.cc/AP6S-U6M8].

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

for a player's return to play.<sup>60</sup> Both the NFL and the NFL Players Association police these policies; in the 2016–17 season, for the first time, failure to follow the checklist protocol could be punished with fines or lost draft picks.<sup>61</sup>

The NFL has also implemented changes to the rules of the game, likely as a reaction to negative publicity. One such rule expands the so-called “defenseless player protection” rule, which protects receivers who are clearly tracking the football in a defenseless position.<sup>62</sup> Tackling a receiver “forcibly in the head or neck area, or us[ing] the crown or hair-line parts of the helmet,” is now considered a foul.<sup>63</sup> Even so, critics say that this rule change and others like it are insufficient to prevent head trauma on the field and have called for additional changes to the NFL rules of play.<sup>64</sup>

### III. OSHA

The Occupational Safety and Health Act of 1970 (OSH Act)<sup>65</sup> was passed to “assure so far as possible every working man and woman in the Nation safe and healthy working conditions,” as “personal injuries and illnesses impose a substantial burden upon, and a hindrance to, interstate commerce.”<sup>66</sup> To effectively accomplish this goal, the OSH Act provided for the creation of OSHA.<sup>67</sup>

This section describes the OSHA enforcement process to the extent helpful to explain what OSHA intervention in the NFL would look like, should it happen. It continues by discussing the requirements that must be satisfied for OSHA to exercise statutory jurisdiction over NFL teams. OSHA must be able to show that an employer-employee relationship exists between NFL players and their teams. As there is not a specific clause of the OSH Act that applies to this situation, OSHA must also be

---

<sup>60</sup> *Id.*

<sup>61</sup> *Protecting Players: Bolstering League Enforcement of its Concussion Protocol*, NFL PLAY SMART PLAY SAFE (Sept. 14, 2016), <https://www.playsmartplaysafe.com/focus-on-safety/protecting-players/bolstering-league-enforcement-of-its-concussion-protocol/> [<https://perma.cc/XFQ9-HDVN>].

<sup>62</sup> *New Rules for the 2015–16 Season*, NFL OPERATIONS, <http://operations.nfl.com/the-rules/new-rules-for-the-2015-16-season> [<https://perma.cc/JH4E-6GHT>].

<sup>63</sup> *Id.*

<sup>64</sup> *See, e.g.*, Trent Gillies, *NFL Needs Big Changes to Concussion Policy, and so Does Everyone Else: Expert*, CNBC (Apr. 24, 2016), <http://www.cnbc.com/2016/04/24/nfl-needs-big-changes-to-concussion-policy-and-so-does-everyone-else-expert.html> [<https://perma.cc/82PH-DKVD>].

<sup>65</sup> 29 U.S.C. §§ 651–678 (2012).

<sup>66</sup> 29 U.S.C. § 651.

<sup>67</sup> U.S. DEP'T OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMIN., OSHA 3360: REFLECTIONS ON OSHA'S HISTORY 4 (2009), [https://www.osha.gov/history/OSHA\\_HISTORY\\_3360s.pdf](https://www.osha.gov/history/OSHA_HISTORY_3360s.pdf) [<https://perma.cc/QGA4-ZHL5>].

able to demonstrate that a violation of its general duty clause has occurred. Should it be able to satisfy both of these conditions, OSHA would have the statutory jurisdiction to intervene and take action against NFL teams.

#### A. OSHA Inspections and Enforcement

OSHA's jurisdiction covers private sector employers, with the exception of the self-employed, family farm workers, and government workers.<sup>68</sup> The agency determines which workplaces to investigate according to a published priority list, with the intent of "focus[ing] inspection resources on the most hazardous workplaces" within this priority list.<sup>69</sup> Most relevant here are OSHA's two highest priorities—imminent danger situations and severe injuries and illnesses. Imminent danger situations involve hazards potentially causing death or serious bodily harm; such hazards are top priority and require immediate correction.<sup>70</sup> The severe injuries and illnesses category also concerns work-related death, bodily harm, and hospitalization incidents.<sup>71</sup>

Compliance and safety health officers responsible for conducting OSHA inspections are "experienced, well-trained industrial hygienists and safety professionals."<sup>72</sup> These inspections are typically conducted without advance notice, although employers can require that compliance officers obtain an inspection warrant prior to entering the worksite.<sup>73</sup> Inspections occur either on-site or by phone or fax.<sup>74</sup>

OSHA categorizes violations as "willful, serious, other-than-serious, *de minimis*, failure to abate, and repeated."<sup>75</sup> If an inspector discovers an OSHA violation, oftentimes OSHA will issue citations and fines.<sup>76</sup> Citations "describe OSHA requirements allegedly violated, list any proposed penalties and give a deadline for correcting the alleged

---

<sup>68</sup> *OSHA Enforcement*, OSHA, <https://www.osha.gov/dep/index.html> [<https://perma.cc/4A5E-D3PT>]. Government workers located in State Plan states, which cover private and public sector employees, are within OSHA's jurisdiction.

<sup>69</sup> U.S. DEPT OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMIN., OSHA INSPECTIONS (Aug. 2016), [https://www.osha.gov/OshDoc/data\\_General\\_Facts/factsheet-inspections.pdf](https://www.osha.gov/OshDoc/data_General_Facts/factsheet-inspections.pdf) [<https://perma.cc/X6U7-HHZR>] [hereinafter OSHA INSPECTIONS]. From highest priority to lowest priority, OSHA inspects: (1) imminent danger situations, (2) severe injuries and illnesses, (3) worker complaints, (4) referrals, (5) targeted inspections, and (6) follow-up inspections.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *OSHA Enforcement*, *supra* note 68.

<sup>75</sup> OSHA INSPECTIONS, *supra* note 69 (emphasis in original).

<sup>76</sup> *Id.*

hazards.”<sup>77</sup> Penalties may be reduced where the employer is small or acts in good faith. Serious violations may incur a reduced penalty pursuant to the gravity of the violation.<sup>78</sup> For context, OSHA conducted 35,820 total inspections in fiscal year 2015, and, from these inspections, discovered 65,044 total violations.<sup>79</sup>

Once OSHA has issued a citation to an employer for an alleged violation, the employer can respond in two ways. First, the employer has the opportunity to participate in an informal conference with the OSHA Area Director, with the goal of entering into a settlement agreement to “resolve the matter and eliminate the hazard.”<sup>80</sup> Employers are also allowed to formally contest the citation within fifteen business days of receipt.<sup>81</sup> This formal contest is sent to the Occupational Safety and Health Review Commission (OSHRC) for independent review.<sup>82</sup> If an employer chooses not to challenge an OSHA citation, the citation becomes a final order.<sup>83</sup>

## B. Employer-Employee Relationship

OSHA jurisdiction requires the existence of an employer-employee relationship. Per the OSH Act, an employer is “a person engaged in a business affecting commerce who has employees.”<sup>84</sup> The OSH Act defines employee in a similarly circular manner: “an employee of an employer who is employed in a business of his employer which affects commerce.”<sup>85</sup>

The Supreme Court has held that where Congress uses the term “employee” without unambiguously defining it, “Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.”<sup>86</sup> To determine existence of a common law employer-employee relationship, the Supreme Court applies the common law test,<sup>87</sup> which looks to whether the hiring party exercises

---

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* Where the violation is deemed to be willful, no good faith penalty adjustment will be made.

<sup>79</sup> 2015 Enforcement Summary, OSHA, [https://www.osha.gov/dep/2015\\_enforcement\\_summary.html](https://www.osha.gov/dep/2015_enforcement_summary.html) [<https://perma.cc/85RN-BFV8>].

<sup>80</sup> OSHA INSPECTIONS, *supra* note 69.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> 29 U.S.C. § 652(5).

<sup>85</sup> *Id.* § 652(6).

<sup>86</sup> *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322–23 (1992).

<sup>87</sup> Occasionally, the OSHRC will instead apply the economic realities test to determine whether an employment relationship exists. The economic realities test is based on the principle

the right to control the manner and means by which the product is realized.<sup>88</sup> There are a number of factors relevant to this inquiry:

the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.<sup>89</sup>

All incidents of the relationship require assessment and weighing; no single factor is decisive.<sup>90</sup> The ultimate inquiry is: "who controls the work environment?"<sup>91</sup>

Courts applying the common law test have used fact-intensive analyses to find an employment relationship.<sup>92</sup> Where the purported employer is responsible for marketing, accounting, administrative, and financial services, and provides the tools and equipment necessary; and where the worker's main contribution is her labor, courts are likely to find an employment relationship. This is especially so where the worker gives the labor in question exclusively to the purported employer.<sup>93</sup>

### C. The General Duty Clause

The majority of OSHA regulation occurs through enforcement of specific standards that were propagated to protect workers from serious hazards.<sup>94</sup> The OSH Act's general duty clause requires that an employer

---

that "employees are those who as a matter of economic reality are dependent upon the business to which they render service." See *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947) (finding a band leader to be the employer of the band members under the economic realities test). The Supreme Court has held that various factors are relevant to this determination: "permanency of the relation, the skill required, the investment if [sic] the facilities for work and opportunities for profit or loss from the activities." *Id.* The result is typically the same under both the common law test and the economic realities test; this Comment assumes the result would be the same here.

<sup>88</sup> *Nationwide Mut. Ins. Co.*, 503 U.S. at 323.

<sup>89</sup> *Id.*

<sup>90</sup> *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968).

<sup>91</sup> *Loomis Cabinet Co. v. OSHA*, 20 F.3d 938, 942 (9th Cir. 1994) (finding an employment relationship between a cabinet company and a partnership contractually obligated to manufacture cabinets).

<sup>92</sup> *Id.* at 941–42.

<sup>93</sup> *Id.*

<sup>94</sup> *OSHA At-a-Glance*, OSHA, <https://www.osha.gov/Publications/3439at-a-glance.pdf> [<https://>

furnish a place of employment “free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”<sup>95</sup> The House Committee on Education and Labor has indicated that the purpose of the general duty clause is to “provide for the protection of employees who are working under such *unique* circumstances that no standard has yet been enacted to cover this situation.”<sup>96</sup> This clause functions as a catch-all to provide OSHA with a vehicle for enforcement where “no specific OSHA standard applies to the hazard.”<sup>97</sup> Neither the OSH Act nor OSHA standards contain a specific carve-out for professional sports.

The general duty clause does not impose strict liability on employers; rather, it limits liability of employers to preventable hazards.<sup>98</sup> Where a hazard is both recognizable and preventable, the typical common law doctrines of assumption of risk, contributory negligence, and comparative negligence do not qualify or modify the employer’s duty to its employees.<sup>99</sup> To establish that the general duty clause has been violated, the Secretary of Labor must show that:

- (1) an activity or condition in the employer’s workplace presented a hazard to an employee, (2) either the employer or the industry recognized the condition or activity as a hazard, (3) the hazard was likely to or actually caused death or serious physical harm, and (4) a feasible means to eliminate or materially reduce the hazard existed.<sup>100</sup>

Of the four prongs, the most ambiguous are the second and fourth (that a hazard be recognizable and preventable, respectively); these prongs are discussed in greater detail below.

---

perma.cc/6RPM-VVH4]. Examples of OSHA standards include limitations on exposure to hazardous chemicals and “requirements to provide fall protection, prevent trenching cave-ins, prevent exposure to some infectious diseases, ensure the safety of workers who enter confined spaces, prevent exposure to such harmful substances as asbestos and lead, put guards on machines, provide respirators or other safety equipment, and provide training for certain dangerous jobs.” *Id.*

<sup>95</sup> 29 U.S.C. § 654.

<sup>96</sup> *SeaWorld of Florida, LLC v. Perez*, 748 F.3d 1202, 1207 (D.C. Cir. 2014) (emphasis in original).

<sup>97</sup> *OSHA At-A-Glance*, *supra* note 94.

<sup>98</sup> *Whirlpool Corp. v. Occupational Safety & Health Review Comm’n*, 645 F.2d 1096, 1098 (D.C. Cir. 1981).

<sup>99</sup> *Nat’l Realty & Constr. Co., Inc. v. Occupational Safety & Health Review Comm’n*, 489 F.2d 1257, 1266 n. 36 (D.C. Cir. 1973).

<sup>100</sup> *Fabi Constr. Co. v. Sec’y of Labor*, 508 F.3d 1077, 1081 (D.C. Cir. 2007).

## 1. Recognizable hazards

There are various ways in which a hazard can be considered recognizable for the purpose of invoking OSHA's general duty clause. Actual knowledge is sufficient to prove that the employer recognized the hazard in question.<sup>101</sup> Where an employer has actual knowledge of the hazard, compliance with existing standards that fail to address the hazard will not absolve the employer of liability under the general duty clause; the employer is still required to provide its employees with a place of employment free from these recognized hazards.<sup>102</sup>

In the absence of actual knowledge, a hazard will be considered recognizable where it is obvious and glaring.<sup>103</sup> This is the case even where industry practice has been to disregard the hazard.<sup>104</sup> Even so, a hazard need not be easily recognizable by humans without the assistance of technical instruments to be considered "recognized."<sup>105</sup>

## 2. Preventable hazards

Even where a hazard is deemed recognizable, employers cannot be held liable unless it is also preventable. Absolute liability for employers is not the goal; rather, the general duty clause seeks to impose a duty that is achievable.<sup>106</sup> For this reason, there must be some demonstration that "feasible measures can be taken to reduce materially the likelihood of death or serious bodily harm resulting to employees" for a hazard to be considered within the scope of the general duty clause.<sup>107</sup>

The preventability requirement carries with it a related requirement of realism. Recognized hazards are not deemed to be preventable where they are "so idiosyncratic and implausible in motive or means" that industry experts would disregard the hazard when prescribing a safety program.<sup>108</sup> Similarly, hazards are not considered preventable

---

<sup>101</sup> *Magma Copper Co. v. Marshall*, 608 F.2d 373, 376 (9th Cir. 1979).

<sup>102</sup> *Safeway, Inc. v. Occupational Safety & Health Review Comm'n*, 382 F.3d 1189, 1194 (10th Cir. 2004).

<sup>103</sup> *Tri-State Roofing & Sheet Metal, Inc. v. Occupational Safety & Health Review Comm'n*, 685 F.2d 878, 880–81 (4th Cir. 1982).

<sup>104</sup> *Id.*

<sup>105</sup> *American Smelting & Refining Co. v. Occupational Safety & Health Review Comm'n*, 501 F.2d 504, 511 (8th Cir. 1974).

<sup>106</sup> *Babcock & Wilcox Co. v. Occupational Safety & Health Review Comm'n*, 622 F.2d 1160, 1164 (3d Cir. 1980).

<sup>107</sup> *Id.*

<sup>108</sup> *Nat'l Realty & Constr. Co., Inc. v. Occupational Safety & Health Review Comm'n*, 489 F.2d 1257, 1266 (D.C. Cir. 1973).



where elimination “would require methods of hiring, training, monitoring, or sanctioning workers which are either so untested or so expensive that safety experts would substantially concur in thinking the methods infeasible.”<sup>109</sup>

### 3. General duty clause, as applied

Were OSHA to take enforcement action against NFL teams, it would be the first time the agency has attempted to regulate professional football. In 2014, OSHA took a similarly novel action when it issued citations against SeaWorld.<sup>110</sup> These citations followed the death of a SeaWorld trainer in an interaction with one of the performing whales; OSHA found that SeaWorld had “expos[ed] the trainers to recognized hazards when working in close contact with killer whales during performances” and so had violated the general duty clause.<sup>111</sup> An administrative law judge confirmed OSHA’s findings.

On appeal, SeaWorld unsuccessfully argued that the hazard in question was neither recognizable nor preventable through feasible means.<sup>112</sup> In its consideration of recognizability, the D.C. Circuit noted that SeaWorld itself had kept records of incident reports involving violent activity by its killer whales.<sup>113</sup> This was sufficient evidence of “SeaWorld’s recognition that the killer whales interacting with trainers are dangerous and unpredictable.”<sup>114</sup> SeaWorld’s assertion that the proposed remedy of limiting trainer-whale contact was not a feasible remedy within the scope of OSHA’s enforcement abilities similarly did not convince the court. Central to the court’s finding was the fact that “[t]he remedy imposed for SeaWorld’s violations does not change the essential nature of its business.”<sup>115</sup> The court also noted, albeit in dicta, a possible related question—whether “physical contact between players is ‘intrinsic’ to professional football in a way that it is not to a killer whale show.”<sup>116</sup>

---

<sup>109</sup> *Id.*

<sup>110</sup> *SeaWorld of Florida, LLC v. Perez*, 748 F.3d 1202, 1204–05 (D.C. Cir. 2014).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 1207.

<sup>113</sup> *Id.* at 1209.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 1210.

<sup>116</sup> *Id.* at 1213.

## IV. OSHA REGULATION OF NFL TEAMS

OSHA has authored two Standard Interpretation letters regarding its jurisdiction to regulate professional sports. In a 2003 letter (“2003 Letter”), the Acting Director of OSHA’s Directorate of Evaluation and Analysis replied to concerns voiced by an employee of a firm that insures professional sports teams.<sup>117</sup> The employee was concerned that “teams have historically omitted information on the injuries and illness of their players from their [Bureau of Labor Statistics] survey responses in the belief that OSHA considers professional football and baseball players to be ‘independent contractors’ rather than ‘employees.’”<sup>118</sup> In response, the Acting Director noted that OSHA had not issued a formal interpretation, nor did relevant case law exist, on whether professional sports players are independent contractors or employees under the common law test.<sup>119</sup> Because of this, he explained, OSHA had not officially determined whether it has jurisdiction over professional sports teams.<sup>120</sup>

In the 2008 interpretation letter (“2008 Letter”), OSHA reiterated that it had yet to make an official determination on the question of whether professional athletes are employees or independent contractors.<sup>121</sup> The 2008 Letter also noted that “[i]n most cases . . . OSHA does not take enforcement action with regard to professional athletes.”<sup>122</sup>

The 2003 Letter and the 2008 Letter constitute the extent of the action OSHA has taken thus far against NFL teams.

Having established that OSHA jurisdiction in this case requires findings of an employment relationship and a violation of the general duty clause, the Comment will proceed to apply the law to the NFL concussion scandal. First, the Comment will demonstrate that NFL players satisfy the common law employment relationship test and so are employees of NFL teams. Next, the Comment will apply jurisprudence regarding OSHA’s general duty clause to NFL teams to conclude the following: as currently played, professional football presents a hazard to NFL players; the industry recognizes the hazard; the hazard is one that

---

<sup>117</sup> See Letter from Frank Frodyma, Acting Dir., Directorate of Evaluation and Analysis, OSHA, to Dave Chamberlain (June 23, 2003), [https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=INTERPRETATIONS&p\\_id=24901](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=24901) [<https://perma.cc/Z7NS-JH6F>].

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> See Letter from Richard E. Fairfax, Dir., Directorate of Enforcement Programs, OSHA, to Robert Van Laanen (Sept. 12, 2008), [https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=INTERPRETATIONS&p\\_id=27301](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=27301) [<https://perma.cc/U5XE-JET8>].

<sup>122</sup> *Id.*

presents a risk or reality of bodily harm or death; and, with changes to the game, it is likely and feasible that the hazard can be materially reduced. Moreover, should the OSHRC proceed in a fact-intensive manner, relying only on information in the record, a court would be likely to uphold its findings.

This Comment will then discuss why OSHA should regulate NFL teams. Regulation of NFL teams would act as a complement to the current and recent threats of litigation, resulting in a greater likelihood of change and prevention of injuries. Furthermore, OSHA regulation of NFL teams would work to combat the perverse incentives inherent in the current NFL concussion and safety protocol.

#### A. OSHA Can Regulate NFL Teams

In order for OSHA to have statutory jurisdiction over NFL teams, it must be able to show that an employment relationship exists between the NFL teams and their players, and it must be able to establish a violation of its general duty clause. Both of these requirements can be satisfied. Also important is the level of deference that a reviewing court will give to findings made by the OSHRC. If OSHA takes action against NFL teams, the teams will surely challenge its authority to do so; accordingly, for the OSHRC's findings to have any significant meaning, it is important to know that a reviewing court will uphold these findings. Because of the highly deferential standard that a reviewing court would apply in this situation, it is very likely that a court would uphold the OSHRC's findings.

##### 1. NFL players are employees of NFL teams

Pursuant to the common law test, NFL players are employees of the NFL teams with which they contract. NFL teams exert considerable and sufficient control over NFL players. The individual teams provide football equipment and uniforms, occasionally with options for the players to purchase additional uniforms or wear their own preferred cleats or helmets.<sup>123</sup> Team practices and games are played at locations designated by the teams, as well as at times designated by either individual teams or the league.<sup>124</sup> While teams do not limit players in their ability

---

<sup>123</sup> *Chris Valenti Answers Your Questions*, DENVER BRONCOS (Jul. 1, 2005), <http://www.denverbroncos.com/news-and-blogs/article-1/Chris-Valenti-Answers-Your-Questions/f6987292-7892-11d-f-ba56-acc8e62813e9> [<https://perma.cc/VB85-H9XG>] (indicating that the team supplies footballs and other practice equipment, as well as uniforms and cleats).

<sup>124</sup> See COLLECTIVE BARGAINING AGREEMENT, *supra* note 16, at 131. While teams are not allowed to require players to complete off-season workouts, players must complete these workouts to receive compensation for them. The CBA limits the scope and timing of off-season workouts, but

to practice or work out on their own, these voluntary workouts are not considered to be part of the team's off-season workout program and are uncompensated.<sup>125</sup> Teams can require participation in mandatory minicamps during the off-season and mandatory practices and workouts during the NFL season.<sup>126</sup>

The duration of the working relationship is for the length of the player's contract with the team; even so, the team can terminate its relationship should the player suffer injury or perform unsatisfactorily, or if the team wishes to create room for "salary cap purposes."<sup>127</sup> Even though these methods of termination typically require the contract salary to be paid out to the player,<sup>128</sup> they indicate that the NFL teams control and determine the lifespan of the working arrangement. Players have the opportunity to increase the amount of money they earn per year by participating in optional off-season workouts, but, as discussed above, these workouts are scheduled by the team.<sup>129</sup> Player choice in off-season workouts does not diminish the amount of control each team exercises over its players. NFL teams hire their own staff and coaches; players do not necessarily influence these hiring decisions, although it seems plausible that star players might have informal influence over this process.<sup>130</sup>

Control manifests itself in other ways, too—NFL teams can dictate player uniforms as well as standards for player conduct (within the scope of league rules and the CBA).<sup>131</sup> The teams also impose media, marketing, and public relations requirements on each player, demonstrating that the extent of their control over players extends beyond stadium walls.<sup>132</sup> Perhaps most importantly, *NFL teams* are in the business of playing football and marketing the game and its players to the public. *NFL players* are at the heart of the business of playing football and are also central to the process of marketing the game to the public. Altogether, the situational factors of the relationship between NFL

within these limits the teams determine the scheduling and content of the workouts.

<sup>125</sup> *Id.* §§ 3, 8f.

<sup>126</sup> *See id.* at 139; *see also NFL Player Contract, supra* note 16, § 33 (indicating that failure to practice with or play for the team constitutes default of the player's obligations under the contract).

<sup>127</sup> *See NFL Player Contract, supra* note 16.

<sup>128</sup> *Id.* Situations exist that would decrease the amount owed to the terminated player; for the purpose of this Comment, these do not have any significant impact on the analysis.

<sup>129</sup> *See COLLECTIVE BARGAINING AGREEMENT, supra* note 16, at 139.

<sup>130</sup> *See, e.g., NFL Team Jobs!*, NFL, <http://footballjobs.teamworkonline.com/teamwork/jobs/default.cfm> [<https://perma.cc/C6UJ-VSNN>] (listing types of positions various NFL teams seek to fill).

<sup>131</sup> *See Chris Valenti Answers Your Questions, supra* note 123. While the team requires the players to wear helmets, choice of helmet is left to the players. *See Borden, supra* note 56; *Soper, supra* note 56.

<sup>132</sup> *See NFL Player Contract, supra* note 16.

players and teams point strongly towards the existence of an employment relationship and, with it, OSHA jurisdiction.

Those who disagree with this assessment might point toward the common law test's inquiry into the skill required to perform the work in question. A greater degree of skill required tends to point toward the worker's status as an independent contractor rather than an employee,<sup>133</sup> and professional football is conventionally thought to require a great deal of skill.<sup>134</sup> But courts have found that skill is not dispositive when the purported employee's primary contribution is labor. For example, in *Loomis Cabinet Co. v. OSHA*<sup>135</sup> the Ninth Circuit affirmed OSHA's finding of an employment relationship between a cabinet company and a partnership contractually obligated to manufacture cabinets.<sup>136</sup> The court noted that the company was responsible for marketing, accounting, administrative, and financial services, and provided the tools and equipment necessary for the cabinet construction.<sup>137</sup> In contrast, the partners' main contribution was their skilled labor, which was given exclusively to the company in question.<sup>138</sup> Much like in *Loomis*, NFL players' primary contribution is their labor.<sup>139</sup>

There is one notable difference between the employment relationship in *Loomis* and that of the NFL teams and players, though—prominent NFL players contribute not only their football skills but also their personal brand to the NFL teams for which they play. Franchises benefit from having a Russell Wilson or a Peyton Manning on their rosters because of the personal brands built around these players' skills; fans are arguably more inclined to buy merchandise related to these players or to attend or watch games than they would be absent the players' personal brands. This seems to cut against a finding of an employment relationship. Even so, and especially in a cumulative view of the situation, it is clear that the NFL teams control the work environment. Thus, NFL players are considered employees and the employment relationship requirement for OSHA jurisdiction is satisfied.

---

<sup>133</sup> See, e.g., Andrew E. Tanick, *Independent Contractor or Employee? The Focus Shifts Again*, 67-SEP BENCH & B. MINN. 16, 17 (Sept. 2010).

<sup>134</sup> Indeed, the standard contract states "Club employs Player as a skilled football player." See, e.g., *NFL Player Contract*, *supra* note 16.

<sup>135</sup> 20 F.3d 938 (9th Cir. 1994).

<sup>136</sup> *Id.* at 941–42.

<sup>137</sup> *Id.* at 942.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

2. The NFL's handling of the concussion scandal is a violation of OSHA's general duty clause

To determine whether a violation of the general duty clause has occurred, the OSHRC applies a four-prong test.<sup>140</sup> As discussed in greater detail below, each of these prongs can be sufficiently satisfied to justify OSHA intervention in the NFL concussion scandal. Both the NFL and its teams have recognized that the concussion scandal presents a hazard to NFL players. Concussions and head trauma lead to the development of CTE, which has caused death in former NFL players. And a feasible means of eliminating or materially reducing the hazard exists. The OSHRC can choose to fine the NFL teams in an attempt to incentivize further rule changes, and it can issue citations to the NFL requiring rule changes. Such rule changes might include a movement towards a style of tackling that removes the players' heads from the game. The NFL teams also might implement practice or game-time policies that incorporate drills performed without helmets. Both of these methods satisfy the feasibility test because implementation of the methods is possible, would materially reduce the hazard in question, and would not change the essential nature of the NFL's business.

*a. Professional football, as currently played, presents a hazard to NFL players*

This prong of the test is easily satisfied. As of 2015, NFL players were suffering an average of 0.43 concussions per game.<sup>141</sup> Since the 2015 season, the NFL has gotten more serious about enforcing its safety protocols to address the aftermath of a collision or injury.<sup>142</sup> The NFL has implemented rule changes aimed at decreasing the number of concussions suffered by its players, but despite these rule changes, the 2015–16 season saw an increase in reported concussions of as much as fifty-eight percent, and the total number of reported concussions in the 2016–17 season was on par with the average of the past four years.<sup>143</sup> Because this is only the number of reported concussions, there is reason to believe that the actual number of concussions suffered is much higher. As discussed later on, there are perverse incentives at every

---

<sup>140</sup> *Fabi Constr. Co. v. Secretary of Labor*, 508 F.3d 1077, 1081 (D.C. Cir. 2007).

<sup>141</sup> *Id.* (emphasis in original).

<sup>142</sup> *Protecting Players: Bolstering League Enforcement of its Concussion Protocol*, NFL PLAY SMART PLAY SAFE, <https://www.playsmartplaysafe.com/focus-on-safety/protecting-players/bolstering-league-enforcement-of-its-concussion-protocol/> [<https://perma.cc/XFQ9-HDVN>].

<sup>143</sup> Gillies, *supra* note 64; Walder, *supra* note 3.

step of the reporting system, which may work to ensure that concussions and head injuries are underreported or, worse, not reported at all. Concussions and repeated head-trauma present a hazard to NFL players as these lead to the development of CTE, which can result in dementia, depression, and occasionally suicide.<sup>144</sup>

*b. The NFL teams and the industry have recognized that professional football, as currently played, is a hazard*

To find a violation of the general duty clause, the OSHRC must determine that the offending circumstance was sufficiently recognizable. This prong of the test, often referred to as the recognizability prong, can be satisfied either with actual knowledge of the hazard or where the hazard is “obvious and glaring.”<sup>145</sup> Here, there is sufficient evidence that the NFL teams and the NFL as an industry had actual knowledge of the hazard presented by professional football as currently played.

In 2009, the NFL officially admitted the link between concussions and other long-term health problems.<sup>146</sup> And recently, the NFL’s top health and safety officer has explicitly acknowledged the link between football-related head trauma and neurodegenerative diseases (like CTE).<sup>147</sup> Therefore, the NFL’s actual knowledge of the hazard is no longer in question.

*c. This hazard is likely to, and actually has, caused death and serious physical harm to NFL players*

The NFL’s admission of the link between football-related head trauma and neurodegenerative diseases makes this prong of the test fairly straightforward. A number of current and former NFL players who suffered from CTE have died in recent years. Many of these deaths

---

<sup>144</sup> Ezell, *supra* note 25. A recent medical study diagnosed the brains of 110 out of 111 deceased NFL players with CTE. See generally Jesse Mez, M.D., M.S., et al., *Clinicopathological Evaluation of Chronic Traumatic Encephalopathy in Players of American Football*, 318 J. AM. MED. ASSOC. 360 (2017); Joe Ward et al., *111 NFL Brains, All but One Had C.T.E.*, N.Y. TIMES (July 25, 2017), [https://www.nytimes.com/interactive/2017/07/25/sports/football/nfl-cte.html?smid=fb-nytimes&smtype=cur&\\_r=0](https://www.nytimes.com/interactive/2017/07/25/sports/football/nfl-cte.html?smid=fb-nytimes&smtype=cur&_r=0) [https://perma.cc/F6AL-9KFW]. The brains used in the medical study were donated to science by the players or their families, which presents a potential self-selection problem; even so, the staggering results indicate that the long-term effects of repeated head trauma may be more severe than previously anticipated.

<sup>145</sup> *Tri-State Roofing & Sheet Metal, Inc. v. Occupational Safety & Health Review Comm’n*, 685 F.2d 878, 880–81 (4th Cir. 1982).

<sup>146</sup> Ezell, *supra* note 25.

<sup>147</sup> Steve Fainaru, *NFL Acknowledges, for the First Time, Link Between Football, Brain Disease*, ESPN (Mar. 15, 2016), [http://www.espn.com/espn/otl/story/\\_id/14972296/top-nfl-official-acknowledges-link-football-related-head-trauma-cte-first](http://www.espn.com/espn/otl/story/_id/14972296/top-nfl-official-acknowledges-link-football-related-head-trauma-cte-first) [https://perma.cc/H52C-H2MG].

can be linked either directly or indirectly to CTE; some committed suicide, which is more likely to occur where one suffers from CTE.<sup>148</sup> Some have passed from accidental overdose of pain medication taken to relieve chronic pain suffered from past football injuries, including head trauma.<sup>149</sup> Others have died from complications with dementia, a mental disorder that is a symptom of CTE.<sup>150</sup>

In *SeaWorld*, the OSHRC found that the recognizability prong was satisfied where a trainer's interaction with a killer whale resulted in her death.<sup>151</sup> Here, with numerous examples of CTE in current and former NFL players who have suffered football-related head trauma, there is ample evidence that the hazard is likely to and actually has caused death and serious physical harm to NFL players.

*d. A feasible means to eliminate or materially reduce the hazard exists*

The feasibility prong of the common law test presents the biggest challenge to OSHA regulation of professional football. To pass this prong, the OSHRC must demonstrate that feasible measures exist that will "reduce materially the likelihood of death or serious bodily harm resulting to employees."<sup>152</sup> For a hazard to be considered preventable under the feasibility prong, it must not be so idiosyncratic and implausible that industry experts would disregard this hazard in prescribing a safety program.<sup>153</sup> Furthermore, prevention of the hazard in question cannot require "methods of hiring, training, monitoring, or sanctioning workers which are either so untested or so expensive that safety experts would substantially concur in thinking the methods infeasible."<sup>154</sup> Related is the concept of the essential nature of the business; a measure to prevent a hazard will not be considered feasible if it changes the essential nature of the employer's business.

In this spirit, for the OSHRC to successfully regulate NFL teams, it must show that there is a feasible means to correct the hazard. At first blush, this seems implausible. The rules of play and league policies

---

<sup>148</sup> *The N.F.L.'s Tragic C.T.E. Roll Call*, N.Y. TIMES (Feb. 3, 2016), [http://www.nytimes.com/interactive/2016/02/03/sports/football/nfl-brain-disease-cte-concussions.html?\\_r=0](http://www.nytimes.com/interactive/2016/02/03/sports/football/nfl-brain-disease-cte-concussions.html?_r=0) [https://perma.cc/M4YC-YR4C].

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *SeaWorld of Florida, LLC*, 24 BNA OSHC 1303 at \*13 (No. 10-1705, 2012) (ALJ).

<sup>152</sup> *Babcock & Wilcox Co. v. Occupational Safety & Health Review Comm'n*, 622 F.2d 1160, 1164 (3d Cir. 1980).

<sup>153</sup> *Nat'l Realty & Constr. Co., Inc. v. Occupational Safety & Health Review Comm'n*, 489 F.2d 1257, 1266 (D.C. Cir. 1973).

<sup>154</sup> *Id.*



are created by the NFL as a league, so enforcement against individual NFL teams may not result in correction of the hazard. But the amendment process for league rules requires an affirmative vote of the teams.<sup>155</sup> As such, it is reasonable to expect that OSHA enforcement against the individual NFL teams would result in change to league rules and policy.

The OSHRC can regulate the NFL teams through either monetary fines or citations that require correction of the hazard in question.<sup>156</sup> Should the OSHRC choose to issue a citation against the NFL teams, there are at least two solutions to the hazard that it might propose: a ban on headfirst tackling and a limit on use of helmets during either practice or gameplay. Each of these are dealt with in further detail below, along with a demonstration that the proposed solutions would likely not change the essential nature of the business.

i. The OSHRC has two methods of regulating the NFL teams: monetary fines and citations requiring correction of the hazard

There are two approaches that the OSHRC can take in its attempt to regulate NFL teams. First, the OSHRC could impose a monetary fine on NFL teams. It is unlikely that the OSHRC would impose a fine so large that it would be considered in violation of the feasibility prong. The initial penalty assessed for a willful or repeated violation is \$126,749, with additional penalties of \$12,675 per day beyond the abatement date for failure to abate.<sup>157</sup> The largest cumulative penalty that the OSHRC has assessed since 1988 totaled \$81,340,000 against BP Products North America, Inc. due to repeated willful violations and failure to abate.<sup>158</sup> Even a penalty of this size seems miniscule in comparison with the NFL's coffers. In 2015, the league itself brought in \$7.24 billion in revenue.<sup>159</sup> This was split between the 32 teams, with each team receiving \$226.4 million.<sup>160</sup> This number does not include money made via local revenue sources (e.g., regional merchandise and ticket sales), so the actual amount of annual revenue flowing to NFL teams is likely much higher.<sup>161</sup> Should the league choose to pay fines

---

<sup>155</sup> *Constitution and Bylaws of the National Football League*, *supra* note 15, at 48.

<sup>156</sup> See OSHA INSPECTIONS, *supra* note 69.

<sup>157</sup> *OSHA Penalties*, OSHA, <https://www.osha.gov/penalties/> [<https://perma.cc/GY34-NF58>].

<sup>158</sup> *Top Enforcement Cases Based on Total Issued Penalty*, OSHA, [https://www.osha.gov/dep/enforcement/top\\_cases.html](https://www.osha.gov/dep/enforcement/top_cases.html) [<https://perma.cc/M29L-BP24>].

<sup>159</sup> James Brady, *The NFL Brought in Enough Money Last Year to Pay for 10 Pluto Missions*, SB NATION (July 20, 2015), <http://www.sbnation.com/nfl/2015/7/20/9006401/nfl-teams-revenue-tv-deal-7-billion> [<https://perma.cc/Q4F2-LS3P>].

<sup>160</sup> *Id.*

<sup>161</sup> Ike Ejiochi, *How the NFL Makes the Most Money of Any Pro Sport*, CNBC (Sept. 4, 2014),

assessed by the OSHRC on behalf of its teams, the feasibility prong surely would not be implicated. If, as is more likely, the individual teams were assessed penalties by the OSHRC, their share of revenue from the NFL would likely more than cover any penalty assessed.<sup>162</sup>

The OSHRC could also issue citations against NFL teams, which would include requirements that the hazard be corrected. In this situation, the OSHRC would be required to show that the NFL teams could feasibly correct the hazard, subject to the complexities above. Of the potential measures that the OSHRC could propose, two seem the most likely to result in less hazardous conduct long-term: (1) a ban on hitting with the head and (2) elimination of the requirement that players wear helmets during games. The former of these is more realistic, although the latter has also been proposed; both are derived from American football's sister sport, rugby.

A change in the tackling method, so as to further remove the head from the tackle process, has the potential to be effective in reducing injuries from football-related head trauma. American football players are taught to play using the method of "heads-up tackling."<sup>163</sup> This tackle technique has players "tak[ing] several, small steps before lunging forward with their heads facing upwards, wrap[ping] the opposing player, then tak[ing] them off their feet and to the ground."<sup>164</sup> Implementation of a league-wide ban on heads-up tackling would require some investment by the league and by individual teams to retrain players, but likely not at a prohibitive cost. NFL teams practice frequently in the preseason and during the season; while it would take some time for current players to relearn how to tackle, it seems realistic that changes to training techniques could help players to learn to tackle without hitting head first.

A second proposed solution is to eliminate the requirement that NFL players wear helmets during practices and games. At first glance, this seems radical—if the goal is to prevent head injuries, taking protective headgear out of the situation feels counterintuitive. A number of commentators have suggested that removing helmets would make the game safer.<sup>165</sup> The argument takes the following form: if players

---

<http://www.cnn.com/2014/09/04/how-the-nfl-makes-the-most-money-of-any-pro-sport.html> [<https://perma.cc/6BPS-7DSV>].

<sup>162</sup> Brady, *supra* note 159.

<sup>163</sup> Aamna Mohdin, *To Deal with Its Concussion Crisis, the NFL Is Starting to Learn from Rugby*, QUARTZ (Sept. 19, 2015), <http://qz.com/504364/hey-football-players-heres-a-thing-or-two-you-can-learn-about-tackling-from-rugby/> [<https://perma.cc/9VW7-29D7>].

<sup>164</sup> *Id.* For a visual example of "heads-up tackling," see *Tackling the Heads Up Way*, NFL, <http://www.nfl.com/videos/nfl-videos/0ap100000066928/Tackling-the-Heads-Up-way> [<https://perma.cc/MM32-DXH3>].

<sup>165</sup> See, e.g., Richard Boadu, *Is No Helmet and No Pads the Future of Tackle Football?*, COMPLEX

know that their heads are not protected, they will be less likely to initiate a situation that would result in head impact.<sup>166</sup> Studies have been done at the university-level that show positive results. In one study, players who removed their helmets for five minutes of drills after practices twice a week during the three-week preseason and once a week during the regular season suffered twenty-eight percent fewer head impacts.<sup>167</sup> By learning tackling techniques without wearing a helmet, players are less likely to tackle with their heads (even if they are wearing a helmet) during games.<sup>168</sup> Elimination of the requirement that players wear helmets during games without sufficient accompanying training would likely result in an increase in physical injury in the short-term, but if players are trained more frequently without their helmets on, it seems likely that there would be an accompanying drop in concussions on the field.

ii. The proposed solutions would likely not be considered to change the essential nature of the game

One question remains: would either of these proposed solutions so change the essential nature of the game such that they would be considered infeasible? For a ban on heads-up tackling, the answer is likely not. Since 2012, the Seattle Seahawks have been training their players to tackle in a new way, so as to “take the head out of the equation.”<sup>169</sup> The fact that the Seahawks have implemented this change on their own indicates that this would not be a drastic change to the essential nature of the business—otherwise, it can be assumed, they would not have implemented the change.<sup>170</sup>

---

(Oct. 23, 2016), <http://www.complex.com/sports/2016/10/no-helmet-no-pads-football> [<https://perma.cc/2SC6-XZ9F>]; Lindsay Gibbs, *Could Getting Rid of Helmets Actually Make Football Safer?*, THINKPROGRESS (Jan. 7, 2016), <https://thinkprogress.org/could-getting-rid-of-helmets-actually-make-football-safer-75393ffe5c32#.bsw3npen7> [<https://perma.cc/VDQ7-XCSP>]; Bill Bradley, *Current, Former Players Suggest Doing Away with Football Helmets*, NFL (Dec. 16, 2013), <http://www.nfl.com/news/story/0ap2000000299501/printable/current-former-players-suggest-doing-away-with-football-helmets> [<https://perma.cc/F8GQ-63HS>].

<sup>166</sup> See Gibbs, *supra* note 165.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> Mohdin, *supra* note 163; see also Sheil Kapadia, *Rugby-Style Tackling Continues to Work for Seahawks' Defense*, ESPN (Jan. 13, 2016), [http://www.espn.com/blog/seattle-seahawks/post/\\_id/17538/rugby-style-tackling-continues-to-work-for-seahawks-defense](http://www.espn.com/blog/seattle-seahawks/post/_id/17538/rugby-style-tackling-continues-to-work-for-seahawks-defense) [<https://perma.cc/NA7B-R5EQ>] (noting that on average, the Seattle Seahawks have sustained fewer concussions in the past three years than 28 teams in the league).

<sup>170</sup> For more information on the Seattle Seahawks's tackling techniques (the “Hawk Tackle”), see Rugby Today, *Seahawks Head Coach Pete Carroll Teaches Rugby Tackling*, YOUTUBE (July 29, 2014), <https://youtu.be/7HihjPApzCg> [<https://perma.cc/XVM9-LZL3>].

It is harder to imagine that the OSHRC or the NFL would turn toward helmet-less play as a solution, but if they did, it would likely not be considered a change to the essential nature of the game. The ultimate query is whether head-first collisions (with or without a helmet) are crucial to the essential nature of the NFL. The OSHRC would likely find that head-first collisions are not crucial. In *SeaWorld*, the OSHRC found that a ban on trainer-interaction with killer whales did not change the essential nature of the business, despite SeaWorld's history of marketing interactions between trainers and killer whales as a prominent part of its business.<sup>171</sup> This demonstrates the leeway the OSHRC has to determine whether something is essential to the nature of a given business. Should the OSHRC be inclined to pursue action against the NFL, it would likely be similarly inclined to find that head-first collisions are not essential to the nature of professional football.

*e. Vagueness challenges to the general duty clause will likely fail*

NFL teams may attempt to argue that OSHA's general duty clause is vague as applied. In *SeaWorld*, the parties made a similar argument. Here, the NFL teams would argue that the vagueness of the general duty clause afforded them insufficient notice of the potential for OSHA enforcement.<sup>172</sup> In *SeaWorld*, the D.C. Circuit disposed of this argument by noting that SeaWorld necessarily had fair notice because the hazard in question was preventable. Notably, "[g]iven evidence of continued incidents . . . SeaWorld could have anticipated that abatement measures it had applied after other incidents would be required" and that the procedures in question "were not entirely effective at stopping [the hazard]."<sup>173</sup> Here, as in *SeaWorld*, the employer's top-of-the-line safety protocol and protective gear have been insufficient to keep its employees safe; recognition of ongoing hazards is sufficient to put NFL teams on notice of potential regulation. This type of argument would likely not be a barrier to OSHA action.

### 3. Courts will uphold the OSHRC's findings

Should the OSHRC decide to take action against NFL teams, it is likely that the teams would choose to challenge the ruling. The case for

---

<sup>171</sup> *SeaWorld of Florida, LLC*, 24 BNA OSHC 1303 at \*1, \*31 (No. 10-1705, 2012) (ALJ) (noting that "killer whales are SeaWorld's signature attraction").

<sup>172</sup> *SeaWorld of Florida, LLC v. Perez*, 748 F.3d 1202, 1216 (D.C. Cir. 2014)

<sup>173</sup> *Id.* (internal citations and quotations omitted.)

regulation is not black and white, but the OSHRC should feel comfortable taking action here, as it will be afforded strong deference by the courts.

OSHRC decisions are upheld unless “arbitrary and capricious, not in accordance with the law, or in excess of the authority granted by OSHA.”<sup>174</sup> The OSH legislation provides that “[t]he findings of the [OSHRC] with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive.”<sup>175</sup> This is measured by the “substantial evidence test,” which courts apply to determine whether to uphold the OSHRC’s factual findings.<sup>176</sup> The four prongs of the general duty clause applicability test, as well as the existence of an employment relationship, are findings of fact.<sup>177</sup>

For a factual finding to pass the substantial evidence test, there must be “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, taking into account whatever in the record fairly detracts from its weight.”<sup>178</sup> In practice, review under the substantial evidence test is highly deferential and typically results in courts upholding the OSHRC’s factual finding. Even so, courts will find the OSHRC’s decision to have failed the substantial evidence test where the OSHRC’s findings were beyond the scope of the record,<sup>179</sup> the findings in question were not supported by any evidence,<sup>180</sup> there is not “an accurate and logical bridge between the evidence and result,”<sup>181</sup> or the evidence overwhelmingly supports a conclusion opposite to that of the OSHRC.<sup>182</sup>

Assuming the OSHRC makes its decisions from information found in the record, and in doing so neither goes beyond the scope of the record nor makes a decision based on no evidence at all, it is likely that a reviewing court will give deference to and uphold the OSHRC’s findings.

---

<sup>174</sup> *Loomis Cabinet Co. v. OSHA*, 20 F.3d 938, 941 (9th Cir. 1994)

<sup>175</sup> 29 U.S.C. § 660(a).

<sup>176</sup> *Id.*

<sup>177</sup> *See, e.g., SeaWorld*, 748 F.3d at 1215 (applying the substantial evidence standard to finding of preventability); *Loomis*, 20 F.3d at 942 (applying the substantial evidence standard to finding of an employment relationship).

<sup>178</sup> *Astra Pharmaceutical Prods. v. Occupational Safety & Health Review Comm’n*, 681 F.2d 69, 72 (1st Cir. 1982) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951) (internal citations omitted)).

<sup>179</sup> *See Nat’l Realty & Constr. Co., Inc. v. Occupational Safety & Health Review Comm’n*, 489 F.2d 1257, 1267 (D.C. Cir. 1973).

<sup>180</sup> *General Elec. Co. v. Occupational Safety and Health Review Comm’n*, 540 F.2d 67, 69 (2d Cir. 1976).

<sup>181</sup> *Chao v. Gunitite Corp.*, 442 F.3d 550, 559 (7th Cir. 2006).

<sup>182</sup> *Daniel Int’l Corp. v. Occupational Safety & Health Review Comm’n*, 683 F.2d 361, 364 (11th Cir. 1982).

## B. OSHA Should Regulate NFL Teams

As established above, OSHA has the power to regulate NFL teams and courts would give deference to OSHA should it choose to regulate the teams. But should OSHA regulate NFL teams? Yes. Enforcement of OSHA's general duty clause against the teams would be an effective method of preventing the serious injuries that have come to be nearly synonymous with the NFL. OSHA regulation would serve as a complement to litigation that has been brought against the NFL, and would combat the perverse incentives inherent in the current system.

### 1. OSHA regulation and litigation as complements

OSHA regulation would be an effective complement to litigation as a method of encouraging player-friendly institutional change in professional football. Thus far, litigation has resulted mainly in monetary damages, which theoretically should incentivize change to professional football; however, these monetary damages were accompanied by settlement clauses that allowed the NFL to deny any and all wrongdoing associated with the concussion scandal. The NFL has implemented some rule changes in reaction to litigation and public pressure. Despite this, concussion rates remain high and critics have argued that the rule changes are insufficient. OSHA can choose to enforce its general duty clause against NFL teams either through monetary fines or through requirements to remove the hazard. Both of these options would serve as effective complements to civil litigation.

Monetary fines would compound with the damages due as a result of settlement (as well as other potential damages resulting from future litigation). The NFL and its teams have deep pockets, but these entities are businesses and likely to respond to financial incentives. Therefore, imposition of additional monetary fines by OSHA would increase the likelihood that the NFL and its member teams internalize costs of concussions and voluntarily make changes to the game to reduce risk of injury to players.

There is some reason to doubt the effectiveness of monetary fines, though—the NFL has yet to respond to financial incentives (e.g., settlement payments) by changing the game to make it less dangerous. Would OSHA *really* impose fines so significant that the NFL changes its behavior? Perhaps. As discussed above, OSHA has imposed sizeable fines in the past, but these large fines were the result of numerous documented violations. In light of this consideration, OSHA may instead choose to enforce its general duty clause through requirements to remove the hazard.

This enforcement tactic would also act as a complement to litigation. Litigation is inherently under-inclusive. This was perhaps best demonstrated by the NFL Players' class action settlement agreement, especially if the resulting rule changes are seen as insufficient. Practically speaking, the settlement agreement benefitted current and past NFL players who have suffered concussions and CTE but does not protect players from suffering head trauma on the field in future games. OSHA regulation in the form of additional rule changes would work to protect future players and prevent football-related head trauma on the field. And in cases where OSHA regulation cannot fully protect players, civil litigation still exists as a means to recover damages on the back-end.

## 2. Perverse incentives

OSHA regulation would be a useful tool to combat the hazard in question, especially as the current system is fraught with perverse incentives. In a perfectly functioning world, a player who suffers a concussion is removed from the game and does not play in future games until any concussive symptoms and injuries suffered have dissipated. Whether this system functions as intended depends on various actors, all of whom have an incentive not to act in accordance with the stated policies.

First, the player himself: sometimes, a hit to the head may be so visible that the referees, the independent medical professional, the coaching staff, or others would identify a potential concussive situation and remove the player from the field for a medical examination. But there also exist situations in which a player suffers a concussion that goes unnoticed by observers; in these cases, the player is responsible for self-reporting the potential head trauma.

This situation presents the problem of discounting. A player, believing he has suffered head trauma, may choose to self-report and remove himself from the game. But for the player to do so, he would have to value the avoidance of possible long-term consequences of a concussion more than the immediate potential benefits of staying in the game. Given that the long-term benefits of self-reporting in this situation are intangible, uncertain, and temporally distant from the present, it is likely that the player would discount their worth and instead choose to stay on the field. Players' contracts and pay depend on their demonstrated skill on the field. From the potentially concussed player's point of view, reporting head trauma necessarily results in being taken off the field (less play time). If instead the player decides not to report head trauma, he has the potential to stay on the field (more play time). If a

player weighs the possibility of increased play time *now* greater than the avoidance of potential negative health effects *later*, then the perverse incentive is clear: on the margins, the player will not report potential head trauma.

Similar perverse incentives exist for the coaching staff. Violation of concussion protocol results in fines and forfeited draft picks, which likely work to align the coaches' incentives with the long-term interests of the players. The 2016–17 season is the first season that these penalties were to be enforced. Despite this, recently released concussion data from the 2016–17 season indicates that the number of reported concussions suffered by players during practice, preseason, and games dropped only slightly from the previous season and was on par with the average from the past four seasons.<sup>183</sup> This indicates that there is still work to be done in terms of concussion prevention.

The system likely works in the most obvious cases of concussions, but where there is room for discretion, the coaching staff may choose to disregard potential concussive symptoms in order to put the player back on the field. The perverse incentives here would be particularly strong if a star player in an important game suffered the concussion; it would be easy to look toward short-term gain for the team while disregarding any potential negative long-term consequences. Even the club medical staff has perverse incentives here; while they are to treat the player as their patient, to whom they owe a duty of care, it is the member teams that pay them. In a borderline case, the scales may tip in favor of the medical call preferred by the organization that signs the doctors' checks.

OSHA action to change the game so as to reduce the risk of concussions on the front-end would do well to combat the perverse incentives entangled in the league policy for dealing with head trauma on the back-end.

## V. CONCLUSION

The idea of government regulation of “America’s sport” is likely to produce a visceral reaction. At least one commentator has argued, albeit in limited detail, that the perception of OSHA as a political institution would work against its involvement in the concussion scandal.<sup>184</sup> The argument alleges that OSHA, as an executive agency, is “necessarily

---

<sup>183</sup> Walder, *supra* note 3. An unknown number of reported concussions suffered in the 2016–17 season were self-reported.

<sup>184</sup> See Rodney K. Smith, *Solving the Concussion Problem and Saving Professional Football*, 35 T. JEFFERSON L. REV. 127, 171 (2013).



politicized” and is subject to oversight by the executive branch and the legislative branch.<sup>185</sup> This, in combination with the “political volatility that would be associated with involving OSHA in regulating the play of America’s game,” would make OSHA less likely to act.<sup>186</sup> Additionally, government regulation of the NFL seems radical. This likely connects to the concept of feasibility, as discussed above. American football is an institution in this country and it is likely that the public would not take to sweeping changes so easily. Should a governmental body choose to meddle in professional sports, it is likely that there would be a negative reaction from the public.

But the concussion scandal is a real problem. The NFL Players Association has not produced a viable solution to the dangers and health risks posed by repeated head trauma (and moreover, there is no evidence that they have tried). Monumental litigation has been brought against the NFL and resulted in insufficient changes to the rules. OSHA involvement may be exactly what is needed to produce effective changes to the game.

Luckily, OSHA has the capacity to work as a collaborative body. OSHA offers a variety of programs aimed at working *with* employers to develop and implement solutions.<sup>187</sup> Some of these programs involve on-site consultations and aid in research efforts.<sup>188</sup> If carefully implemented, it is likely that OSHA could work with the NFL to discover solutions that would produce minimal disruption to the league as a business and to football as an entertainment sport, while making strides in protecting players from on-field head trauma. The public perception problem might be mitigated if the public were to see OSHA using these programs in its enforcement efforts to help the NFL solve its concussion problem.

OSHA would do well to enforce its general duty clause against NFL teams. As it stands now, the NFL rules of play inadequately protect professional football players from football-related head trauma and ensuing dangers. Due to the perverse incentives inherent in the current NFL reporting system, OSHA regulation would serve as a healthy complement to litigation in its attempts to prevent concussions on the front end, rather than to care for players who have suffered head trauma on the back-end.

---

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> See, e.g., U.S. DEP’T OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMIN, OSHA FACT BOOK 28–36 (Dec. 2008), <https://www.osha.gov/as/opa/OSHAfact-book-stohler.pdf> [<https://perma.cc/TD78-733J>].

<sup>188</sup> *Id.* at 34–35.