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COMMENTS

LEVELING THE PLAYING FIELD AMONG THE NFL, CLUBS, AND PLAYERS—BY AMENDING THE EMPLOYEE RETIREMENT INCOME SECURITY ACT

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I. INTRODUCTION

The National Football League (NFL) consists of thirty-two teams within eight divisions.¹ Approximately 45.7 million people tuned in for the 2014 NFL Draft,² and 114.4 million people watched Super Bowl XLIX.³ Of the five major professional sports leagues in North America—the NFL, Major League Baseball, Major League Soccer, the National Hockey League, and the National Basketball Association—the NFL outranked all the leagues in average per game attendance by more than 35,000 attendees during the 2013–2014 season, with an average attendance of 68,397 people.⁴ The NFL currently achieves \$10

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1. *NFL Teams*, NFL, <http://www.nfl.com/teams> (last visited Dec. 14, 2015).

2. *2014 NFL Draft Watched by a Record 45.7 Million Viewers*, NFL (May 12, 2014), <http://www.nfl.com/draft/story/0ap2000000349728/article/2014-nfl-draft-watched-by-a-record-457-million-viewers>. A blustering 7.03 million viewers tuned in for the first day of the 2015 NFL Draft. Dominic Patten, *NFL Draft Day 1 Watched by 7.03M; Third Best Result Ever*, DEADLINE (May 1, 2015), <http://deadline.com/2015/05/nfl-draft-ratings-espn-down-viewership-1201419142/>.

3. Frank Pallotta, *Super Bowl XLIX Posts the Largest Audience in TV History*, CNNMONEY (Feb. 2, 2015), <http://money.cnn.com/2015/02/02/media/super-bowl-ratings/>.

4. *Average Per Game Attendance of the Five Major Sports Leagues in North America 2014/15*, STATISTA, <http://www.statista.com/statistics/207458/per-game-attendance-of-major-us-sports-leagues/> (last visited Dec. 14, 2015) (noting that Major League Baseball is the second highest

billion in annual revenue,⁵ with the Dallas Cowboys as the highest valued club at \$4 billion.⁶ However, a more startling statistic arises from the period between January 24, 2000, and October 15, 2015, during which time over 800 NFL players were arrested.⁷

Despite the NFL's popularity, it is afflicted with excessive instances of player misconduct, including drunk driving, drug and alcohol abuse, domestic violence, child abuse, sexual assault, and murder.⁸ Yet, regardless of a player's misconduct while playing in the NFL, he is still able to receive retirement benefits, which can result in a substantial amount of money upon attaining retirement age. It does not seem fair or equitable that a player who engages in misconduct, harming the NFL or a particular NFL club's image, is still able to retain retirement benefits that were intended to reward that player for faithful employment.

The NFL's retirement plan is regulated by the Employee Retirement Income Security Act of 1974 (ERISA),⁹ a federal act, which forbids withholding or forfeiting retirement benefits because an employee engages in objectionable acts or misconduct. This Comment proposes that Congress should amend ERISA to allow an employer, such as the NFL, to withhold retirement benefits for employee misconduct. Section II discusses the NFL's retirement plan and benefits that players currently enjoy. Section III provides several recent examples of current and former NFL players who engaged in misconduct. Section IV explains how ERISA regulates private employment-provided retirement plans. Finally, Section V proposes several solutions for how Congress can reduce employee misconduct within the NFL and other employment realms by amending ERISA. While it is unlikely that withholding retirement benefits will completely eliminate player misconduct in the NFL, a misconduct exception would ensure retribution against players who no longer deserve benefits intended for faithful employment. As such, amending ERISA would promote equitable relationships between employers and employees,

ranked league with an average of 30,437 attendees per game).

5. Brent Schrottenboer, *NFL Takes Aim at \$25 Billion, but at What Price?*, USA TODAY (Feb. 5, 2014), <http://www.usatoday.com/story/sports/nfl/super/2014/01/30/super-bowl-nfl-revenue-denver-broncos-seattle-seahawks/5061197/>.

6. *The Business of Football*, FORBES, <http://www.forbes.com/nfl-valuations/list/> (last visited Dec. 14, 2015).

7. Brent Schrottenboer, *NFL Player Arrests*, USA TODAY, <http://www.usatoday.com/sports/nfl/arrests/> (last visited Dec. 14, 2015) (compiling "arrests, charges and citations of NFL players for crimes more serious than common traffic violations").

8. *See generally id.*

9. 29 U.S.C. §§ 1001–1381 (1976).

including within the NFL.

II. UNDERSTANDING THE NFL'S RETIREMENT PLAN AND BENEFITS

The NFL provides its players with several retirement plans and benefits, which are contained within the NFL's collective bargaining agreement. The retirement plans include the Bert Bell/Pete Rozelle NFL Player Retirement Plan and the NFL Player Second Career Savings Plan.

A. The NFL's Collective Bargaining Agreement

The current collective bargaining agreement (NFL CBA) between the NFL and National Football League Players Association (NFLPA), the union for professional football players,¹⁰ became effective on August 4, 2011.¹¹ The NFL CBA and its terms pertain to current NFL players, previous NFL players, rookie NFL players selected in the NFL Draft, and undrafted NFL rookie players who commence negotiations with an NFL club.¹² The NFL CBA contains a wide breadth of terms and conditions between the NFL and NFLPA, including players' contracts, compensation, performance, and injury protection, among many others.¹³ However, this Comment is concerned with the NFL CBA only as it relates to retirement benefits provided by the Bert Bell/Pete Rozelle NFL Player Retirement Plan and the NFL Player Second Career Savings Plan.¹⁴

B. The Bert Bell/Pete Rozelle NFL Player Retirement Plan

Between 1962 and 1987, NFL players were eligible to receive pension retirement benefits under the Bert Bell NFL Retirement Plan (Bert Bell Plan).¹⁵ At the end of the 1982 collective bargaining agreement, the NFLPA and the National Football League Management Council failed to reach a new agreement concerning pension benefits.¹⁶ Subsequently, the Pete Rozelle NFL Player Retirement Plan (Pete Rozelle Plan) was created in 1989 to offer pension

10. *About the NFLPA*, NFL PLAYERS ASS'N, <https://nflpa.com/about> (last visited Dec. 14, 2015).

11. NFL COLLECTIVE BARGAINING AGREEMENT pmb1. (2011), https://nflpaweb.blob.core.windows.net/media/Default/PDFs/General/2011_Final_CBA_Searchable_Bookmarked.pdf [hereinafter NFL CBA].

12. *Id.*

13. *See generally* NFL CBA, *supra* note 11.

14. *See id.* arts. 53–54.

15. BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN 1 (2007), <http://nflretired.baughweb.com/Resources/BertBellPlans/2007Bert%20Bell%20Pete%20Rozelle.pdf> [hereinafter RETIREMENT PLAN].

16. *Id.*

retirement benefits to NFL players.¹⁷ Under the 1993 collective bargaining agreement, the Bert Bell Plan and Pete Rozelle Plan were merged to create the Bert Bell/Pete Rozelle NFL Player Retirement Plan (Retirement Plan).¹⁸ Subsequent collective bargaining agreements amended the Retirement Plan, but it remains the current retirement plan agreement between the NFL and NFLPA.¹⁹

The Retirement Plan is comprised of contributions made by individual NFL teams, which are used exclusively to provide retirement benefits to vested players.²⁰ To become vested in retirement benefits, players must have (1) three or more credited seasons, including at least one season after the 1992 season; (2) four or more credited seasons, including at least one season after the 1973 season; or (3) five or more credited seasons.²¹ After a player becomes vested in his retirement benefits, he is eligible to receive those benefits at the age of fifty-five.²² Vested players have a non-forfeitable right to their benefits, whereas non-vested players' benefits are forfeitable.²³

For each credited season, a player will receive a monthly amount in retirement benefits,²⁴ which will continue for the entirety of his lifetime.²⁵ The monthly amounts a vested player may receive per credited season are (1) \$250: before 1982; (2) \$255: 1982 through 1992; (3) \$265: 1993 through 1994; (4) \$315: 1995 through 1996; (5) \$365: 1997; (6) \$470: 1998 through 2011; (7) \$560: 2012 through 2014; (8) \$660: 2015 through 2017; and (9) \$760: 2018 through 2020.²⁶ For example, a player who obtains credited seasons from 1992 through 2000 will receive a total monthly credit of \$3,190, based on the credited

17. *Id.*

18. *Id.*

19. *Id.*

20. BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN: RETIREMENT PLAYBOOK SUMMARY PLAN DESCRIPTION 37–38, 43 (2013), https://nflparesources.blob.core.windows.net/mediareources/files/PDFs/Benefits/Bell_Rozelle_Retirement_SPDf.pdf [hereinafter RETIREMENT PLAN SPD].

21. RETIREMENT PLAN, *supra* note 15, at 6.

22. RETIREMENT PLAN SPD, *supra* note 20, at 9–10. It is also worth noting that early retirement at the age of forty-five is possible if a player is vested and has a credited season prior to 1993, although the monthly benefit amount will be reduced. *Id.* at 10. Additionally, vested players may choose to defer their retirement benefits until age sixty-five, which would increase the monthly benefit amount. *Id.*

23. RETIREMENT PLAN, *supra* note 15, at 7.

24. *Id.* at 10.

25. George Earl Koonce, Jr., *Role Transition of National Football League Retired Athletes: A Grounded Theory Approach*, 23 MARQ. SPORTS L. REV. 249, 281 (2013).

26. NFL CBA, *supra* note 11, art. 53.

season amounts of \$255 + \$265 + \$265 + \$315 + \$315 + \$365 + \$470 + \$470 + \$470.²⁷

In addition to the retirement benefits described above, the Retirement Plan also provides disability benefits to vested players who are permanently or totally disabled and death benefits to a player's widow and minor children.²⁸ Based on estimates in 2009, the Retirement Plan held \$800 million in assets and paid \$6.5 million in benefits each month.²⁹

C. The NFL Player Second Career Savings Plan

NFL players also receive retirement benefits under the NFL Player Second Career Savings Plan (Savings Plan), which is a 401(k) plan.³⁰ A player can contribute to his individual 401(k) plan if he earns a credited season that year and also during a prior year.³¹ An NFL club will make a matching contribution of two dollars for every one dollar a player contributes to his 401(k) plan.³² However, even if a player does not make a contribution, or makes only a small contribution, to his individual 401(k) plan, an NFL team will still contribute at least (1) \$3,600 for any player who earns a credited season during that plan year and has at least three credited seasons; (2) \$7,200 for any player who earns a credited season that plan year and has exactly two credited seasons; or (3) \$1,000 for any player who earns exactly one credited season.³³ The Savings Plan is reported to have more than 7,700 participants and over \$1.6 billion in plan assets.³⁴

27. Koonce, *supra* note 25, at 281. If the same player takes early retirement at age forty-five, he will only receive a monthly amount of \$1,442, whereas if he takes deferred retirement at age sixty-five, he will receive \$8,335 a month. *Id.*; see also RETIREMENT PLAN SPD, *supra* note 20, at 11–12 (illustrating monthly amounts a vested player may receive based on varying factors).

28. RETIREMENT PLAN SPD, *supra* note 20, at 1, 18, 33.

29. Michael Lydak & Andrew Zapata, *Tackling the Issues: The History of the National Football League's 2011 Collective Bargaining Agreement and What It Means for the Future of the Sport*, 10 WILLAMETTE SPORTS L.J. 17, 29 (2012).

30. NFL CBA, *supra* note 11, art. 54. See generally NFL PLAYER SECOND CAREER SAVINGS PLAN: 401K PLAYBOOK SUMMARY PLAN DESCRIPTION (2012), https://nflparesources.blob.core.windows.net/mediaresources/files/PDFs/Benefits/SCS_SPD.pdf [hereinafter SAVINGS PLAN SPD].

31. SAVINGS PLAN SPD, *supra* note 30, at 7.

32. *Id.* at 8; NFL CBA, *supra* note 11, art. 54. A maximum limit is placed on matching contributions an NFL club may contribute to a player's 401(k) plan, including a maximum of \$24,000 for plan years 2011–2014; \$26,000 for plan years 2015–2018; and \$28,000 for plan years 2019–2020. SAVINGS PLAN SPD, *supra* note 30, at 8.

33. NFL CBA, *supra* note 11, art. 54; see also SAVINGS PLAN SPD, *supra* note 30, at 8.

34. *Savings Board of the NFL Player Second Career Savings Plan*, BRIGHTSCOPE, <http://www.brightscope.com/401k-rating/252010/Savings-Board-Of-The-Nfl-Player-Second-Career-Savings-Plan/256087/Nfl-Player-Second-Career-Savings-Plan/> (last visited Dec. 14, 2015).

Under the Savings Plan, players are fully vested in their 401(k) account plans, meaning the retirement benefit rights are non-forfeitable.³⁵ A player is eligible to receive Savings Plan benefits upon attaining age forty-five but cannot continue to defer distribution once reaching age sixty-five.³⁶ Further, if a player dies prior to receiving the entirety of the balance in his individual 401(k) plan, his spouse is eligible to receive the remaining balance.³⁷

D. Retirement for NFL Players

Although professional football players experience many benefits while playing in the NFL, including large salaries and bonuses,³⁸ many players have found life after the NFL to be a difficult transition.³⁹ Former linebacker for the Green Bay Packers George Koonce explained that for the majority of NFL players, retirement occurs due to injuries, making a player feel as though he has less “control over [his] life and career decisions.”⁴⁰ Retired players often experience depression and feelings of rejection.⁴¹ Moreover, a player exit survey showed that 69% of players who left the NFL in 2006 did so without a job.⁴² Players with health issues often encounter large medical bills but only have health insurance through the NFL for a short time after retirement.⁴³

Moreover, despite players’ large salaries while playing in the NFL, only two years after retirement, 78% were “bankrupt or . . . under financial stress because of joblessness or divorce.”⁴⁴ So while it may be easy for a current NFL player to discount retirement benefits as unimportant or inconsequential, a

35. SAVINGS PLAN SPD, *supra* note 30, at 10, 23 (noting two exceptions: (1) when a player elects to withdraw from automatic enrollment and (2) if a player cannot be found by the Plan Office).

36. *Id.* at 14.

37. *Id.* at 17.

38. See *NFL Salary Rankings*, SPOTRAC, <http://www.spotrac.com/nfl/rankings/base/> (last visited Dec. 14, 2015) (listing the highest 2015 base salary at \$16 million for Darrelle Revis, cornerback for the New York Jets); *NFL Salary Rankings*, SPOTRAC, <http://www.spotrac.com/nfl/rankings/signing-cash/> (last visited Dec. 14, 2015) (listing the highest 2015 signing bonuses at \$31 million for Russell Wilson, quarterback for the Seattle Seahawks, and Ben Roethlisberger, quarterback for the Pittsburgh Steelers, and Eli Manning, quarterback for the New York Giants).

39. See generally Koonce, *supra* note 25.

40. *Id.* at 276.

41. *Id.* at 277.

42. *Id.* at 279.

43. *Id.* at 282 (explaining how former player for the Cincinnati Bengals Reggie Williams accumulated \$500,000 in medical expenses from his knee injuries—none of which were covered by the NFL’s disability benefits).

44. Pablo S. Torre, *How [and Why] Athletes Go Broke*, SPORTS ILLUSTRATED (Mar. 23, 2009), <http://www.si.com/vault/2009/03/23/105789480/how-and-why-athletes-go-broke#>.

player should consider the startling realization that life after the NFL is not always easy, especially if he has no retirement benefits to rely on.

III. ISSUES OF PLAYER MISCONDUCT PLAGUING THE NFL

Although player misconduct is not a recent phenomenon in the NFL—one need only revisit the case of former New England Patriots linebacker Eric Naposki, who murdered his lover’s boyfriend in 1994,⁴⁵ or former Carolina Panthers wide receiver Rae Carruth, who conspired to have his pregnant girlfriend murdered in 1999⁴⁶—it seems that instances of wrongdoing by NFL players are constantly in the news.

In September 2014, a video of Ray Rice, former running back for the Baltimore Ravens, was posted online that showed Rice punching his then-fiancée in the face, knocking her to the ground, and dragging her from the elevator where the incident occurred.⁴⁷

Also in September 2014, Adrian Peterson, running back for the Minnesota Vikings, was indicted by a grand jury in Montgomery County, Texas, for “reckless or negligent injury to a child” after Peterson hit his son with a switch to discipline him.⁴⁸ The child’s injuries included “bruises and lacerations on [his] back, legs, arms and buttocks,” which a doctor confirmed “[were] consistent with child abuse.”⁴⁹ Peterson later accepted a plea deal that reduced his charges to a single misdemeanor “charge of reckless assault.”⁵⁰

45. *Eric Naposki Gets Life in Prison: Ex-NFL Player Sentenced for Murder*, HUFFPOST SPORTS (Aug. 10, 2012), http://www.huffingtonpost.com/2012/08/10/eric-naposki-life-prison-murder-sentence_n_1765638.html.

46. Kevin Armstrong, *End Zone: Carruth and Consequences*, N.Y. DAILY NEWS, <http://www.nydailynews.com/sports/football/zone-carruth-consequences-article-1.1576536> (last updated Jan. 11, 2014); *Once Promising NFL Player Rae Carruth Now a Prison Janitor*, ABC NEWS (June 30, 2014), <http://abcnews.go.com/Sports/promising-nfl-player-rae-carruth-now-prison-janitor/story?id=24368134>.

47. *Video of Ray Rice Punch Released*, ESPN (Sept. 8, 2014), http://espn.go.com/nfl/story/_/id/11486837/new-video-released-baltimore-ravens-ray-rice-hitting-fiancee. Rice was suspended indefinitely from the NFL for his actions; however, he later won his appeal of the decision, prompting his reinstatement to the NFL. *Ray Rice Wins Appeal, Eligible to Sign*, ESPN (Dec. 1, 2014), http://espn.go.com/nfl/story/_/id/11949855/ray-rice-baltimore-ravens-wins-appeal-eligible-reinstatement.

48. Steve DiMatteo, *A Timeline of the Adrian Peterson Child Abuse Case*, SBNATION (Sept. 17, 2014), <http://www.sbnation.com/2014/9/17/6334793/adrian-peterson-child-abuse-statement-vikings-timeline>.

49. *Id.*

50. Lynn Zinser, *Adrian Peterson Agrees to Plea Deal in Child-Abuse Case*, N.Y. TIMES (Nov. 4, 2014), <http://www.nytimes.com/2014/11/05/sports/football/vikings-adrian-peterson-reaches-plea-deal-in-child-abuse-case.html>.

Wes Welker, wide receiver for the St. Louis Rams, was suspended for the first four games of the 2014 season after testing positive for amphetamines, violating the NFL's drug policy.⁵¹

Josh Gordon, wide receiver for the Cleveland Browns, was charged with drunk driving after being pulled over for driving fifteen miles per hour over the posted speed limit in July 2014.⁵² Gordon also failed a drug test when he tested positive for marijuana.⁵³ Gordon previously violated the NFL's drug policy during the 2013 season.⁵⁴

In July 2014, Greg Hardy, defensive end for the Dallas Cowboys, was found guilty of assaulting and threatening a female.⁵⁵ The attack occurred in Hardy's apartment where Hardy placed his hands around her neck and threatened to kill her.⁵⁶

Former defensive end for the San Francisco 49ers Ray McDonald was arrested for felony domestic violence in August 2014⁵⁷ after a woman alleged McDonald sexually assaulted her.⁵⁸

On April 15, 2015, Aaron Hernandez, former tight end for the New England Patriots, was convicted of first-degree murder and sentenced to life in prison without parole for a 2013 shooting.⁵⁹ At the time of this writing, Hernandez still

51. Kevin Clark, *Broncos' Wes Welker Suspended Four Games After Drug Test*, WALL STREET J. (Sept. 2, 2014), <http://www.wsj.com/articles/broncos-wes-welker-suspended-four-games-after-drug-test-1409703724>.

52. *Browns' Josh Gordon Arrested*, ESPN (July 7, 2014), http://espn.go.com/nfl/story/_/id/11178895/josh-gordon-cleveland-browns-arrested-dwi.

53. Mike Florio, *Josh Gordon Will Be Suspended 10 Games Under New Drug Policy*, PROFOOTBALLTALK (Sept. 12, 2014), <http://profootballtalk.nbcsports.com/2014/09/12/josh-gordon-will-be-suspended-10-games-under-new-drug-policy/>.

54. *Toucher: Josh Gordon's One-Year Marijuana Suspension Ridiculous*, CBS BOS. (Aug. 28, 2014), <http://boston.cbslocal.com/2014/08/28/toucher-josh-gordons-one-year-marijuana-suspension-ridiculous/>.

55. *Greg Hardy Found Guilty of Assault*, ESPN (July 16, 2014), http://espn.go.com/nfl/story/_/id/11220817/greg-hardy-carolina-panthers-guilty-2-counts-domestic-violence.

56. *Id.*

57. Dan Hanzus, *Ray McDonald Arrested on Domestic Violence Charges*, NFL (Aug. 31, 2014), <http://www.nfl.com/news/story/0ap3000000386508/article/ray-mcdonald-arrested-on-domestic-violence-charges>. The charges against McDonald were later dropped due to "insufficient evidence." Lindsay H. Jones, *49ers' Ray McDonald Won't Be Charged in Domestic Violence Case*, USA TODAY (Nov. 10, 2014), <http://www.usatoday.com/story/sports/nfl/49ers/2014/11/10/ray-mcdonald-not-charged-felony-domestic-violence-assault/18801223/>.

58. Lindsay H. Jones, *New Details Emerge Around Ray McDonald Sexual Assault Allegations*, USA TODAY (Dec. 22, 2014), <http://www.usatoday.com/story/sports/nfl/2014/12/22/ray-mcdonald-49ers-sexual-assault-accuastion/20777737/>.

59. Susan Candiotti, Laura Dolan & Ray Sanchez, *Aaron Hernandez Verdict: Guilty of Murder*,

faces two additional murder charges for a shooting he committed in 2012.⁶⁰

On June 15, 2015, Darren Sharper, former safety for the New Orleans Saints, pleaded guilty to three rape charges, arising from incidents in Louisiana, California, Nevada, and Arizona,⁶¹ where Sharper drugged and raped women while they were under the influence of the drugs he placed in their drinks.⁶² Sharper will serve ten years in federal prison.⁶³

The multitude of negative activity occurring among current and former NFL players prompts the question of what the NFL can do to deter such misconduct. Some suggestions include making the NFL Code of Conduct more specific, disciplining teams and players, creating a league-wide concussion policy (to ensure players' judgment is not affected), and implementing a three-strike policy (imposing a one-season suspension after three transgressions).⁶⁴ While such suggestions may be effective and beneficial for the NFL, NFL clubs, and NFL players, this Comment explores an additional solution to deter bad behavior among NFL players and also to ensure equitable employment relationships—by forfeiting players' retirement benefits for misconduct.

IV. FEDERAL REGULATION OF RETIREMENT PLANS AND BENEFITS

To understand the implications of this argument, it is necessary to understand the federal statute that regulates the NFL's Retirement Plan and Savings Plan.⁶⁵ ERISA was enacted to deal with a multitude of issues concerning private employment retirement plans and benefits, including vesting, funding, and fiduciary duties and responsibilities.⁶⁶ Because ERISA is a very complex statute, the explanation of its implications is limited to the extent it applies to this Comment.

CNN, <http://www.cnn.com/2015/04/15/us/aaron-hernandez-verdict/> (last updated Apr. 16, 2015).

60. Michelle R. Smith, *Aaron Hernandez to Face Boston Double Murder Charges Next*, HUFFPOST CRIME (Apr. 15, 2015), http://www.huffingtonpost.com/2015/04/15/aaron-hernandez-double-murder_n_7072022.html.

61. Elliott Smith, *Darren Sharper Pleads Guilty to 3 Rape Charges in Four-State Deal*, CBSSPORTS (June 15, 2015), <http://www.cbssports.com/nfl/eye-on-football/25214990/former-saints-cb-darren-sharper-pleads-guilty-to-3-more-rapes>.

62. *Id.*

63. *Id.*

64. Joel Michael Ugolini, *Even a Violent Game Has Its Limits: A Look at the NFL's Responsibility for the Behavior of Its Players*, 39 U. TOL. L. REV. 41, 54–57 (2007).

65. See RETIREMENT PLAN SPD, *supra* note 20, at 50–52; SAVINGS PLAN SPD, *supra* note 30, at 26–27 (discussing a player's ERISA rights).

66. Employee Retirement Income Security Act, 29 U.S.C. § 1001(b)–(c) (1976); see also COLLEEN E. MEDILL, INTRODUCTION TO EMPLOYEE BENEFITS LAW: POLICY AND PRACTICE 10–13 (3d ed. 2011).

A. Multiemployer Retirement Plans

ERISA regulates different types of retirement plans; however, the type of plan relevant to the NFL is a multiemployer plan. A multiemployer plan “is sponsored by more than one employer pursuant to a collective bargaining agreement.”⁶⁷ Accordingly, multiemployer plans are “administered by a board of trustees comprised of an equal number of representatives from management and labor.”⁶⁸ As discussed above, the relationship between the NFL and NFLPA is governed by the NFL CBA, making the Retirement Plan and Savings Plan subject to regulation by ERISA as multiemployer plans.⁶⁹

B. Vesting Rights and the Anti-Alienation Rule Under ERISA

Vesting concerns an employee’s non-forfeitable right to retirement benefits: once an employee becomes vested in retirement benefits, those benefits cannot be taken from that employee.⁷⁰ Forfeiture for misconduct is permissible, so long as an employee has not yet vested in the retirement benefits.⁷¹ However, ERISA precludes alienation or assignment of an employee’s benefits, meaning an employee cannot voluntarily assign retirement benefits to a third party and retirement benefits must be paid directly to an employee (i.e., not to an employee’s creditors).⁷² ERISA requires that benefits are held in trust and used for “the exclusive purpose[] of providing benefits to participants in the plan and

67. MEDILL, *supra* note 66, at 33.

68. *Id.*; see also RETIREMENT PLAN SPD, *supra* note 20, at 40; SAVINGS PLAN SPD, *supra* note 30, at 20 (explaining that the Retirement Plan and Savings Plan are “administered by [a] . . . Board of Trustees[]” comprised of six voting members, with three members each “selected by the NFLPA and . . . the NFL Management Council[] and t]he Commissioner serving” as “a nonvoting member” and the Chairman).

69. See RETIREMENT PLAN SPD, *supra* note 20, at 40 (stating “[t]he Retirement Plan is a *multiemployer* defined benefit pension plan”) (emphasis added); SAVINGS PLAN SPD, *supra* note 30, at 20 (stating “[t]he Savings Plan is a *multiemployer*-defined contribution plan”) (emphasis added).

70. MEDILL, *supra* note 66, at 11.

71. See Mary F. Radford, *Implied Exceptions to the ERISA Prohibitions Against the Forfeiture and Alienation of Retirement Plan Interests*, 1990 UTAH L. REV. 685, 708–09 (explaining that the Internal Revenue Service appears to permit “bad boy clauses” if an employee is not yet vested in retirement benefits).

72. MEDILL, *supra* note 66, at 216–17. Specific exceptions to the anti-alienation rule include the following:

- (1) A loan . . . from assets held in [a] participant’s plan account.
- (2) A voluntary and revocable assignment made by a participant to a third party of not more than 10% of any benefit payment
- (3) A state or federal court order, judgment, consent decree, or settlement agreement
- (4) A payment . . . to an alternate payee pursuant to a qualified domestic relations order.

Id. at 218 (citations omitted).

their beneficiaries.”⁷³ If a retirement plan does not satisfy the trust requirement, it is not considered a “qualified plan” and thus will not receive favorable tax treatment under the Internal Revenue Code.⁷⁴ As such, an employer has an incentive to avoid violating the anti-alienation rule and to ensure it maintains a qualified plan.⁷⁵

C. ERISA’s Preemption Power over State Laws

It is also important to note that ERISA has preemption power over state laws regulating private retirement plans and benefits.⁷⁶ Specifically, section 514(a) of ERISA states, “[T]he provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.”⁷⁷ In earlier decisions, the Supreme Court interpreted the “relate to” language in section 514(a) broadly to mean any “state law [that] has a *connection with* . . . or . . . *reference to* an employee benefit plan.”⁷⁸

Despite its earlier decisions, the Supreme Court later determined its broad interpretation of section 514(a) led to over-reaching results with no stopping point.⁷⁹ The Court explained Congress did not intend to disregard the limiting language of section 514(a) by preempting state laws that have “only a tenuous, remote, or peripheral connection with [employee benefit] plans,” especially if a state law was historically “a matter of local concern.”⁸⁰ The Supreme Court’s decision in *Travelers Insurance Co.* created a presumption against preemption when a state law regulates an area of traditional state concern.⁸¹ Further, to determine if a state law has a “connection with” an employee benefit plan, the *Travelers Insurance Co.* analysis asks whether a state law affects plan administration and regulation too much or only indirectly.⁸² If a state law

73. Employee Retirement Income Security Act, 29 U.S.C. § 1103(a), (c)(1) (1976).

74. MEDILL, *supra* note 66, at 94–95.

75. *Id.* at 95.

76. *Id.* at 651.

77. 29 U.S.C. § 1144(a).

78. MEDILL, *supra* note 66, at 655 (referencing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96–97 (1983)); *see also* *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990) (explaining Congress used the broad “relate to” language in section 514(a), thus specifically “rejecting more limited preemption language”); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987) (noting the “expansive sweep” of section 514(a)’s broad “relate to” language).

79. *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995).

80. *Id.* at 661.

81. MEDILL, *supra* note 66, at 674.

82. *Travelers*, 514 U.S. at 660–62.

interferes only indirectly with plan administration, it will not be preempted by ERISA.⁸³ Additionally, the Supreme Court limited the preemption power of the “reference to” prong created in *Shaw* by holding a state law is only preempted when it “acts immediately and exclusively upon ERISA plans” or “where the existence of ERISA plans is essential to the law’s operation.”⁸⁴

V. A SOLUTION TO THE NFL’S PLAYER MISCONDUCT ISSUE

Despite ERISA’s provisions prohibiting forfeiture of vested retirement benefits, supporting anti-alienation, and preempting state laws, there are several solutions that could reduce NFL player misconduct and promote an equitable employment relationship. Such solutions would allow the NFL or an NFL team to withdraw a player’s retirement benefits by amending ERISA to allow for the alienation of retirement benefits for misconduct and certain illegal acts. The public sector should be used as a guide for amending ERISA.

A. Amending ERISA to Permit Alienation of Benefits for Player Misconduct

Congress should amend ERISA to permit alienation of an employee’s retirement benefits if that employee engages in misconduct against his employer. An amendment is necessary because ERISA currently only allows alienation of benefits for four specific exceptions⁸⁵ and the Supreme Court refused to find an implied exception to the anti-alienation rule for employee fraud or misconduct. Creating such an amendment would create equitable relationships between employers and employees, by ensuring an employee acts in the best interest of his employer and abides by his employer’s rules and policies.

1. The Supreme Court’s Refusal to Find an Implied Misconduct Exception to the Anti-Alienation Rule

In *Guidry v. Sheet Metal Workers National Pension Fund*, the employee pled guilty to violating the Labor-Management Reporting and Disclosure Act of 1959 when he embezzled more than \$377,000 from his union.⁸⁶ While incarcerated, the employee filed a claim that he was wrongfully denied benefits

83. *Id.* at 664–65.

84. *Cal. Div. of Labor Standards Enf’t v. Dillingham Constr., Inc.*, 519 U.S. 316, 325 (1997) (holding a California law that permitted lower wages for apprentices did not “reference” an employee benefit plan because “apprenticeship programs need not necessarily be ERISA plans”).

85. *See* MEDILL, *supra* note 66, at 218.

86. 493 U.S. 365, 367 (1990).

from his pension plan.⁸⁷ While the Supreme Court recognized the unsatisfactory result of its decision in granting the employee the benefits,⁸⁸ it relied heavily on Congress's intent to not allow garnishment of benefits in implementing ERISA's anti-alienation provision.⁸⁹ The Supreme Court expressed concern over a court's ability to create an exception for employees' acts of fraud or misconduct, for it would "swallow the [anti-alienation] rule" and force courts to decide circumstances that were "'especially' inequitable."⁹⁰ The Supreme Court reasoned that such decisions were impracticable; thus, Congress, not courts, should create exceptions to the anti-alienation provision.⁹¹

2. Support for an Exception to the Anti-Alienation Rule

Because of courts' inability to imply an anti-alienation exception for employee fraud or misconduct after *Guidry*,⁹² Congress should amend ERISA to allow for such an exception. Several commentators have urged Congress to amend ERISA to allow for alienation of employee benefits under particular situations.

One proponent argues Congress should amend ERISA's anti-alienation provision to permit an exception when an employee commits fraud or embezzlement against an employer or retirement plan.⁹³ Several courts prior to *Guidry* found an implied exception for fraud under the anti-alienation provision of ERISA,⁹⁴ believing Congress could not have intended to protect such wrongdoers.⁹⁵ A fraud amendment would provide protection to all employees in a retirement plan and their employer by permitting an employer to regain costs imposed on a retirement plan by a wrongdoer who either threatened continuation of a plan or caused harm to the plan itself.⁹⁶

Additionally, another proponent argues that while ERISA's anti-alienation

87. *Id.* at 368.

88. *Id.* at 377 (stating "there may be a natural distaste for the result we reach here.").

89. *Id.* at 372–73.

90. *Id.* at 377.

91. *Id.*

92. See Rodger L. Puz, *Recent Decision*, 29 DUQ. L. REV. 139, 157, 162–63 (1990); Radford, *supra* note 71, at 732.

93. Michael Alan Frazee, Comment, *ERISA—Exceptions to the Anti-Alienation Provision: Strengthening ERISA's Protection Through a Fraud Amendment*, 10 W. NEW ENG. L. REV. 317, 341 (1988).

94. *Id.* at 352.

95. *Id.* at 353 (referencing *Crawford v. La Boucherie Bernard, Ltd.*, 815 F.2d 117 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 943 (1987), *reh'g denied*, 484 U.S. 1020 (1988)).

96. *Id.* at 353–54.

provision seems reasonable and even desirable,

to shield pension benefits from an employer who seeks restitution for willful and often malicious criminal acts that reduce, either directly or indirectly, the benefits of other law abiding pensioners or, at the very least, impair the ability of an employer to make contributions, is contrary not only to notions of fairness and equity but to policies of ERISA itself.⁹⁷

Thus, an amendment to the anti-alienation provision should preclude protection of an employee who is convicted of “an act of fraud, theft, conversion, or embezzlement . . . which has caused a reduction of plan assets and/or [sic] a loss to the employer or employee organization.”⁹⁸ Not permitting such a provision conflicts with Congress’s intention to protect plan participants and instead protects those employees who harm their employer, thus reducing an employer’s ability to contribute to a retirement plan and ultimately harming other participants.⁹⁹

Similarly, a third proponent explains that while ERISA’s anti-alienation provision was intended to protect employees’ retirement benefits, its broad restrictions also protect certain abuses, thus shifting economic burdens onto “innocent victim[s].”¹⁰⁰ While exceptions to the anti-alienation provision exist,¹⁰¹ certain abuses are still protected under ERISA, such as employee criminal misconduct and bankruptcy.¹⁰² While the anti-alienation provision was enacted for beneficial purposes, the provision “allows, and even encourages, other strains on the economic system and violations of other sacredly held social policies.”¹⁰³ The proponent urges Congress to subject employees who engage in wrongdoing to alienation and its unfavorable effects as “ERISA cannot choose to economically protect the guilty or irresponsible over the innocent or

97. Charles T. Caliendo, Jr., Note, *Removing the “Natural Distaste” from the Mouth of the Supreme Court with a Criminal Fraud Amendment to ERISA’s Anti-Alienation Rule*, 68 SAINT JOHN’S L. REV. 667, 704–05 (1994).

98. *Id.* at 707.

99. *Id.* at 718–19.

100. Sharon Reece, *The Gilded Gates of Pension Protection: Amending the Anti-Alienation Provision of ERISA Section 206(D)*, 80 OR. L. REV. 379, 380 (2001).

101. *Id.* at 388. For example, domestic support orders and breaches of fiduciary trust are exceptions to the anti-alienation provision under ERISA. *Id.* at 392–99.

102. *See id.* at 399–404.

103. *Id.* at 412–13.

unfortunate and claim to uphold economic protection for society.”¹⁰⁴

Likewise, another proponent explains that permitting an employer to regain the costs it contributed to an employee’s retirement account is different than allowing third-party creditors to access such retirement accounts.¹⁰⁵ An employer extends contributions to an employee while that employee continues to defraud the employer, thereby harming the employer that has no available recourse.¹⁰⁶ On the other hand, a creditor is able to monitor a debtor and suspend credit if necessary, whereas it is much harder for an employer to monitor an employee’s misconduct and take action before harm results.¹⁰⁷ To ensure undeserving employees do not enjoy retirement benefits at the expense of their harmed employer, an amendment to ERISA’s anti-alienation provision should permit garnishment if an employee is found guilty in court.¹⁰⁸

As such, because the Supreme Court determined courts cannot find an implied misconduct exception to ERISA’s anti-alienation provision, Congress should amend the ERISA to include an exception that permits alienation of retirement benefits if an employee engages in misconduct or actions that harm his employer.

3. A Misconduct Exception to the Anti-Alienation Rule

Similar to the arguments above that advocate for fraud, bankruptcy, and criminal misconduct exceptions, other misconduct can be equally detrimental to an employer. The NFL requires its “players, coaches, other team employees, owners, game officials and all others privileged to work in the” NFL to abide by its Personal Conduct Policy.¹⁰⁹ The Personal Conduct Policy forbids (1) criminal offenses, such as “the use or threat of violence; domestic violence . . . theft . . . sex offenses; obstruction or resisting arrest; disorderly

104. *Id.* at 434–35.

105. Bonnie H. Rattner, Note, *Employee Theft and ERISA: A Proposed Amendment to Garnish Pension Benefits*, 10 CARDOZO L. REV. 315, 335–36 (1988).

106. *Id.* at 336.

107. *Id.* at 336–37.

108. *Id.* at 339.

109. NFL, PERSONAL CONDUCT POLICY (2014), https://nflpaweb.blob.core.windows.net/media/Default/PDFs/Active%20Players/2014_Personal_Conduct_Policy.pdf [hereinafter PERSONAL CONDUCT POLICY]. In December 2014, the NFL owners approved a new process for handling violations of the Personal Conduct Policy. See NFL, THE NEW NFL PERSONAL CONDUCT POLICY (2014), <http://i.usatoday.net/sports/nfl/2014-12-10-new-nfl-personal-conduct-policy.pdf>; Tom Pelissero, *NFL Owners Pass New Personal Conduct Policy*, USA TODAY (Dec. 10, 2014), <http://www.usatoday.com/story/sports/nfl/2014/12/10/roger-goodell-nfl-owners-personal-conduct-policy/20199033/>.

conduct; fraud; racketeering; and money laundering”; (2) “[c]riminal offenses relating to steroids and prohibited substances”; (3) “[v]iolent or threatening behavior among employees”; (4) “[p]ossession of a gun or other weapon in any workplace setting”; (5) “[c]onduct that imposes inherent danger to the safety and well being [sic] of another person; and” (6) “[c]onduct that undermines or puts at risk the integrity and reputation of the NFL, NFL clubs, or NFL players.”¹¹⁰ If a player violates the Personal Conduct Policy, the NFL may impose discipline, including “fines, suspension, or banishment from the [NFL] and may include a probationary period and conditions that must be satisfied prior to or following reinstatement.”¹¹¹

Despite the NFL’s Personal Conduct Policy and the discipline it imposes on players for violations, player misconduct continues to occur. If the NFL could alienate retirement benefits as an additional form of discipline against players who violate the Personal Conduct Policy, there would be greater deterrence to avoid prohibited conduct. Moreover, allowing the NFL or an NFL club to rescind retirement benefits from a player who engages in misconduct ensures the NFL or NFL team has a form of recourse against that player. As such, Congress should amend ERISA to create an exception to the anti-alienation rule that would allow employers to alienate an employee’s retirement benefits for violating a provision of the employer’s policies, such as the NFL’s Personal Conduct Policy.

Similar to violating the NFL’s Personal Conduct Policy, when NFL players engage in crimes such as domestic violence, drug use, or drunk driving, the impact on the NFL and a respective NFL club is considerable. A player may be suspended temporarily or indefinitely, which impacts a team’s ability to compete.¹¹² Furthermore, issues of violence deter fans, such as women, from watching or supporting an NFL team or the NFL in its entirety.¹¹³ When a player, or employee in general, engages in actions that cause substantial harm to an employer, it is unjust to require an employer to continue providing that employee with retirement benefits. Moreover, it does nothing to deter such

110. PERSONAL CONDUCT POLICY, *supra* note 109, at 1 (emphasis omitted).

111. *Id.* at 2.

112. *See NFL Suspensions Taking a Heavy Toll on 2014 Already*, SBNATION (Sept. 2, 2014), <http://www.sbnation.com/nfl/2014/7/3/5867515/nfl-suspensions-2014-robert-mathis-daryl-washington-lane-johnson>.

113. *See* Ron Kroichick, *Domestic Violence Rocks NFL Image, Threatens Brand*, SFGATE, <http://www.sfgate.com/sports/kroichick/article/Domestic-violence-rocks-NFL-image-threatens-brand-5753979.php> (last updated Sept. 13, 2014); Linda Rubin & Gayle Sulik, *NFL, Pink Ribbons Not Enough to Win over Women*, CNN, <http://www.cnn.com/2014/10/16/opinion/sulik-rubin-football-domestic-violence-awareness/> (last updated Oct. 16, 2014).

misconduct from occurring in the future. As a result, Congress should amend ERISA to include an exception to the anti-alienation provision that permits an employer to recover payments made to an employee's retirement plan if that employee engages in misconduct that violates the employer's conduct policies or harms the employer. The exception would promote a fair and equitable relationship between an employer and its employees, ensuring that an employee, or player, who harms his employer or violates his employer's policies is not rewarded for his wrongdoing.

*B. Amending ERISA to Allow for a Slayer Exception to the
Anti-Alienation Rule*

Similar to an exception for employee misconduct, Congress should also amend ERISA to include a slayer exception to the anti-alienation rule. A slayer statute precludes an employee from receiving retirement benefits when an employee is convicted of killing his or her spouse.¹¹⁴ A slayer exception to ERISA would ensure that an employee who engages in heinous crimes, such as murder, cannot benefit from his crime. Although the Supreme Court has not expressly prohibited courts from inferring such an exception, an amendment to ERISA would provide clear notice to employees that engaging in such conduct can result in the loss of retirement benefits.

1. Judicial Treatment of State Slayer Statutes

As discussed previously, ERISA has preemption power over state laws regulating employee benefit plans that interfere "too much" with plan administration and regulation.¹¹⁵ The Supreme Court in *Egelhoff v. Egelhoff* preempted a Washington statute regulating beneficiary status of probate assets because it interfered too much with plan administration and regulation.¹¹⁶ The Washington statute required that plan administrators be familiar with applicable state laws when distributing benefits, rather than adhering to the retirement plan, which the Supreme Court found greatly interfered with plan administration.¹¹⁷ Further, allowing each state to impose its own law interferes with ERISA's purpose of ensuring national uniformity among employee benefit administration

114. Caliendo, *supra* note 97, at 680.

115. N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 660 (1995).

116. *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 143, 148, 150 (2001).

117. *Id.* at 147–48.

and regulation.¹¹⁸ The Supreme Court responded to the claim that its holding also requires preemption of states' slayer statutes, explaining

[t]hose statutes are not before us, so we do not decide the issue. We note, however, that the principle underlying the statutes—which have been adopted by nearly every State—is well established in the law and has a long historical pedigree predating ERISA. And because the statutes are more or less uniform nationwide, their interference with the aims of ERISA is at least debatable.¹¹⁹

Despite ERISA's preemption power over state laws regulating employee benefit plans, several courts have upheld state slayer statutes, permitting alienation of retirement benefits for employees who violated the state statute.¹²⁰ For example, in *Mack v. Estate of Mack*, Charla and Darren Mack were in the midst of divorce proceedings when Darren shot and killed Charla.¹²¹ Nevada's slayer statute stated "a killer cannot profit or benefit from his wrong."¹²² The court held ERISA did not preempt Nevada's slayer statute; thus, Darren could not benefit from murdering Charla.¹²³ In determining the statute was not preempted, the court explained, "Congress did not intend ERISA to preempt state laws that prohibit murderers from reaping financial benefits because of their crimes."¹²⁴ Relying on precedent from the Second Circuit, the court determined the Nevada statute was not preempted because it did "not affect the determination of an employee's eligibility for benefits."¹²⁵ The court's decision is consistent with several other courts that determined an employee convicted of killing his or her spouse is not entitled to retirement benefits.¹²⁶

118. *Id.* at 148.

119. *Id.* at 152 (citation omitted).

120. *See* Radford, *supra* note 71, at 724–26.

121. 206 P.3d 98, 101, 104 (Nev. 2009).

122. *Id.* at 111.

123. *Id.*

124. *Id.* at 110 (referencing *UNUM Ins. Co. of Am. v. Locke*, 2006 WL 2457106 (W.D. La. Aug. 22, 2006); *Atwater v. Nortel Networks, Inc.*, 388 F. Supp. 2d 610, 614 (M.D.N.C. 2005); *Conn. Gen. Life Ins. Co. v. Riner*, 351 F. Supp. 2d 492, 497 (W.D. Va. 2005); *Admin. Comm. for the H.E.B. Inv. & Ret. Plan v. Harris*, 217 F. Supp. 2d 759, 761 (E.D. Tex. 2002); *New Orleans Elec. Pension Fund v. Newman*, 784 F. Supp. 1233, 1236 (E.D. La. 1992); *Mendez-Bellido v. Bd. of Tr. of Div. 1181, A.T.U. N.Y. Emps. Pension Fund & Plan*, 709 F. Supp. 329, 331 (E.D.N.Y. 1989)).

125. *Id.*

126. *See* Caliendo, *supra* note 97, at 680 n.54.

Conversely, some courts have held state slayer statutes are preempted by ERISA. For instance, in *Ahmed v. Ahmed*, Lubaina Ahmed designated her husband Nawaz Ahmed as the primary and secondary beneficiary of her life insurance policy.¹²⁷ Nawaz later killed Lubaina and was sentenced to death.¹²⁸ Because of the confusion regarding who was listed as additional beneficiaries, Lubaina's two children disputed the insurance company's decision.¹²⁹ The Ohio slayer statute dictated that no person who murdered an heir could receive benefits from the murder,¹³⁰ which in this instance would lead to only the one child listed as a co-beneficiary receiving the policy benefits.¹³¹ However, because the court found ERISA preempted the Ohio statute, that result was inaccurate.¹³² The court reasoned that one of ERISA's goals was to achieve national uniformity in terms of plan benefits; as such, requiring plan administrators to know every states' applicable law and burden of proof would impose too great of a burden on plan administrators.¹³³ As a result, the court held the Ohio statute was preempted by ERISA.¹³⁴

2. Slayer Exception to the Anti-Alienation Rule

To resolve the dispute of whether state slayer statutes are preempted by ERISA, Congress should enact an amendment to ERISA that permits an exception to the anti-alienation provision. It is evident from the split of authority that the courts in favor of upholding state slayer statutes are concerned with the inequity of allowing a wrongdoer to benefit from his acts, while courts in favor of preempting state slayer statutes are concerned with Congress's intent to ensure national uniformity among retirement plan administration and regulation. Creating a slayer exception to the anti-alienation rule would satisfy both concerns, so long as one national, uniform standard is enforced under ERISA. As such, an exception should be enacted under ERISA to permit alienation of retirement benefits for employees who violate the slayer provision by committing murder.

Moreover, the misconduct and slayer exceptions should be enacted and applied in light of one another. Although it may be uncommon for an NFL

127. 158 Ohio App. 3d 527, 2004-Ohio-5120, 817 N.E.2d 424, ¶ 5 (7th Dist.).

128. *Id.* ¶ 7.

129. *Id.* ¶ 8.

130. *Id.* ¶ 16.

131. *Id.* ¶ 17.

132. *Id.*

133. *Id.* ¶¶ 31, 35.

134. *Id.* ¶ 43.

player to murder his spouse,¹³⁵ subsequently reaping the rewards of their shared retirement benefits, it begs the question of whether any person who commits murder or similar heinous crimes, regardless of who the victim is, should receive retirement benefits. When an employee commits such crimes, his actions are detrimental to his employer. For example, when an employee commits a crime, he may be forced to miss work, or more specifically, in the NFL, a player may be suspended for his actions.¹³⁶ Moreover, if an employee is arrested for, or found guilty of, a crime, such as sexual assault or murder, his employer experiences negative attention in response to the employee's actions.¹³⁷ In the NFL, negative attention and publicity can have an even greater adverse impact compared to the impact on an employer that is not constantly within the public's eye.

Despite an employee's actions that harm his employer, an employer is still required to contribute to an employee's retirement plan. It is hard to imagine that when Congress enacted ERISA to protect retirement benefits, it also meant to punish employers by requiring them to pay retirement benefits to employees who engaged in detrimental acts harmful to their employer. To ensure equitable employment relationships and promote fairness, Congress should amend ERISA to allow for misconduct and slayer exceptions to the anti-alienation rule, allowing the NFL to seek retribution against players who harm the NFL or an NFL club.

C. Looking to the Public Sector for Guidance

Although ERISA regulates only "private-sector retirement plans,"¹³⁸ the

135. An unfortunate number of NFL players have murdered their girlfriends. See Armstrong, *supra* note 46 (discussing how former Carolina Panthers wide receiver Rae Carruth conspired to have his pregnant girlfriend murdered); Laura McCallister, *Jovan Belcher Kills Himself in Front of Crennel, Pioli After Thanking Them*, KCTV5, <http://www.kctv5.com/story/20234680/police-chiefs-players-kills-girlfriend-then-kills-self> (last updated June 10, 2013) (discussing how former Kansas City Chiefs linebacker Jovan Belcher shot himself after he shot and killed his girlfriend).

136. See generally *2014 NFL Fines & Suspensions*, SPOTRAC, <http://www.spotrac.com/nfl/fines-suspensions/2014/suspensions/> (last visited Dec. 14, 2015) (listing forty-nine NFL players' suspensions in 2014 for offenses ranging from "[v]iolating the NFL's substance abuse policy" to "conviction for intoxication manslaughter," among many others).

137. See Carl Bialik, *Have Ray Rice and Roger Goodell Hurt NFL Ratings?*, FIVETHIRTYEIGHT (Sept. 28, 2014), <http://fivethirtyeight.com/datalab/have-ray-rice-and-roger-goodell-hurt-nfl-ratings/> (stating that twenty-one percent of women and twenty-three percent of men viewed the NFL "less favorably" due to the league's handling of "domestic violence and child abuse allegations," and fifteen percent of both women and men were "less likely to watch" for the same reason); Linda Rubin & Gayle Sulik, *supra* note 113 (discussing how it is hard for some women to support the NFL and its violence).

138. *Frequently Asked Questions About Retirement Plans and ERISA*, U.S. DEP'T LAB., http://www.dol.gov/ebsa/faqs/faq_compliance_pension.html (last visited Dec. 14, 2015).

way in which the public sector handles pension forfeiture for employees who engage in misconduct provides helpful guidance for how similar instances should be handled in the private sector. The justifications for public officials' pension forfeiture rest upon the ideals that pensions are intended for faithful service; pension forfeiture is an appropriate punishment for breaching the public trust and a deterrent for public corruption; and pension forfeiture holds symbolic importance.¹³⁹ As of June 2015, twenty-nine states have laws that permit forfeiture of retirement benefits if public officials engage in some form of misconduct relating to their service in office.¹⁴⁰

Michael Steele, former mayor of Irvington, New Jersey, experienced the magnitude of pension forfeiture after he accepted “\$120,000 in kickbacks from contractors” while in office.¹⁴¹ As a result of his misconduct, Steele was forced to forfeit the entirety of his pension plan.¹⁴² Despite Steele's argument that he should only have to forfeit amounts received when the misconduct occurred, the court found the entire pension amount was forfeited.¹⁴³ Further, Steele was also required to pay \$120,000 in restitution.¹⁴⁴ The harsh consequences Steele faced exemplify the approach taken by several states in response to public officials' misconduct.

Although public and private pension plans are regulated by different laws and public pension plans are funded by taxpayers, as opposed to private employers, the justifications for public pension forfeiture are relevant to the private sector as well. Similar to public employers, private employers offer retirement benefits to reward employees for faithful employment. It is unlikely that an employer would want to reward an employee who later engages in misconduct or harms the employer in some way. Additionally, withholding retirement benefits could deter employee misconduct in the private sector, as well as in the public sector. Despite the difference in regulating and funding of pension plans, the justifications for retirement benefit forfeiture and alienation are similar within the public and private sectors. As such, the public pension

139. James B. Jacobs, Coleen Friel & Edward O'Callaghan, *Pension Forfeiture: A Problematic Sanction for Public Corruption*, 35 AM. CRIM. L. REV. 57, 76–80 (1997).

140 See generally NASRA, SELECTED STATE POLICIES GOVERNING TERMINATION OR GARNISHMENT OF PUBLIC PENSIONS (2015), <http://www.nasra.org/files/Compiled%20Resources/Forfeiture%20statutes.pdf>.

141. MaryAnn Spoto, *N.J. Public Employees Convicted of Misconduct Must Forfeit Pension Accrued at Time of Crime*, NJ (May 20, 2011), http://www.nj.com/news/index.ssf/2011/05/nj_panel_rules_public_employee.html.

142. *Id.* Steele had two pension plans, but only the second plan covered his employment when the misconduct occurred. *Id.*

143. *Id.*

144. *Id.*

system may be a form of guidance for amending ERISA's anti-alienation rule.

VI. CONCLUSION

In response to the growing amount of player misconduct in the NFL, additional action must be taken to end the continuous violence and illegal activity occurring off the playing field. While players are subject to suspensions or fines for violating the NFL's Personal Conduct Policy, the egregious acts and misconduct continue. This Comment explores the possibility of creating an exception to ERISA's anti-alienation provision that would allow the NFL or an NFL club to recover retirement benefits paid to a player who engages in misconduct or harms the NFL or an NFL club. The amendment would serve as a deterrent for player misconduct, while also promoting a fair and equitable employment relationship, allowing a wronged employer to seek retribution from a player who engages in misconduct or harms the employer.

Because the Supreme Court determined there is not an implied misconduct exception to ERISA's anti-alienation provision, an amendment is necessary to allow for such an exception. The misconduct exception would ensure that players who engage in misconduct or harm their employer are penalized for their actions. Congress should amend the anti-alienation provision to also permit a slayer exception that would be read in light of the misconduct exception to ensure players who engage in criminal acts are not rewarded for their crimes. Under the amended version of ERISA, NFL players would have an additional reason to avoid actions that could risk their retirement benefits. Lastly, if Congress is not convinced it should amend ERISA, it need only look to the public sector for guidance. The NFL is a well-known and respected organization; yet, the growing instances of player misconduct threaten that prestige. In response, Congress should amend ERISA by creating a misconduct exception that would allow for alienation of retirement benefits to ensure equitable employment relationships and to reduce employee misconduct in the NFL.