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COACHING IN THE NATIONAL FOOTBALL LEAGUE: A MARKET SURVEY AND LEGAL REVIEW

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I. INTRODUCTION

The genesis for this article comes from a conversation with a National Football League (NFL) club executive who complained that the information he had at his disposal related to coaching compensation and contract terms was incomplete, and he felt that it put him at a competitive disadvantage in preparing for and handling negotiations with both his head coach and his assistant coaches alike. A bit of investigation indicated that this executive was far from alone in this feeling. It is in the negotiation of NFL coaching contracts that clubs maintain less information and perhaps less leverage. This is a particularly uncomfortable position for NFL clubs used to having strong information and a standardized contract for their dealings with players. It

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National Football League (NFL) coaches crave information. The NFL coaching profession is characterized by individuals uncommonly dedicated to study, analysis, structure and attention to myriad detail, requisite qualities in the disciplined choreography of talented, though frequently mercurial, professional football players. Accomplished (read: employed) NFL executives share these qualities. Ironically, the employment market for NFL coaches, whose participants include both groups, is relatively uninformed and uncoordinated. For NFL coaches, this discrepancy becomes more pronounced as the ever-increasing commitment required to succeed in their public profession provides them commensurately less time to study the fundamentals of their personal business. In this market, NFL executives fare no better. It makes little sense then that these two groups of information seekers, so accountable to and dependent on others – networks, owners, players and fans – have yet to employ permissible means to achieve an informed marketplace.
becomes critical then to examine the factors that have led to this perceived imbalance, particularly when some of the best run and most sophisticated organizations in professional sports, NFL franchises, believe they have reached a competitive disadvantage. Does such an imbalance tilting in favor of coaches and their representatives exist? Or is it merely limited to a few highly sought-after coaching candidates who have the power to create a different market? Or is there something elementally different between how coaches are hired and how their contracts are negotiated than the way players are acquired and their contracts are negotiated? What factors have contributed to the present state of affairs regarding coaching contracts? This article seeks possible explanations in the presently murky state of the unexplored area of the NFL coaching market.

Part II of this article considers the legal and practical implications of unionizing NFL coaches as a means for securing an intelligent marketplace immune from antitrust scrutiny. Part III considers the marketplace for NFL coaches. Part IV examines the NFL’s Anti-Tampering Policy’s impact on the hiring process and its application to coaches vis a vis players. Part IV also introduces the Rooney Rule. Part V provides an analysis of required, typical, unique and glaringly absent provisions found (or not found) in most NFL coaching contracts. Part VI offers a comprehensive analysis of NFL coaches’ current pension plans. Part VII reviews the governing legal principles of sharing market information and posits a protocol for avoiding antitrust liability in the context of disseminating accurate and detailed coaching contract information among and between NFL coaches and NFL clubs. The Article concludes with a simple observation.

II. LACK OF A COACHES UNION LIMITS ANTITRUST IMMUNIZATION

Several factors have contributed to the situation that the NFL executive complained of. Some factors are purely market-based, which will be discussed in detail later in this article, and some factors are caused by the intersection of law and the market place. The first major factor based purely on law that shapes the landscape of the coaching market is a simplistic one: NFL coaches are not unionized like players. As such, the clubs dealings with them are not given the benefit of the statutory and non-statutory labor exemptions to the antitrust laws.¹

The Second Circuit Court of Appeals’ recent decision reversing Maurice

Clarett's challenge to the NFL draft\(^2\) because of the non-statutory labor exemption and the Supreme Court's refusal to take up Clarett's appeal firmly establish that courts give great deference to the subjects of collective bargaining between unions and employers.\(^3\)

The NFL Coaches Association (NFLCA), which operates out of the National Football League Players Association (NFLPA) offices in Washington, DC, has been incorporated since 1996 as a 501(c)(5) not-for-profit labor organization.\(^4\) The NFLCA describes its mission as one of "perpetuating and promoting the game of football and preserving its integrity."\(^5\) The NFLCA has involved itself in discussions with the NFL on behalf of its members, more than 700 active and retired head and assistant coaches, specifically in the area of the extension of health and retirement benefits.\(^6\) However, unlike the NFL players and their union, the NFLCA—notwithstanding its being officed within the NFLPA headquarters—has never sought to become certified and recognized as a union or attempted to collectively bargain on behalf of its members.

If the coaches formed a union, they would have the ability to collectively

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2. *Id.* Maurice Clarett, a star running back on Ohio State University's National Championship football team during the 2002 season, had been suspended by the team, university and NCAA when he sought to enter the NFL draft. *Id.* at 125-26. Clarett was only two years removed from high school, and NFL eligibility rules required that he be three years removed from high school to be eligible. *Id.* at 126. He brought an antitrust challenge to the NFL in the Federal District Court for the Southern District of New York. *Id.* at 124.

It was a challenge described by Duke University law professor Paul Haagen as "a strong antitrust case." Haagen said, "In the United States, any attempt by competitors to restrain competition in the labor market is regarded by the courts with great suspicion. Unless the restraint falls under a limited number of narrow exceptions, it will be treated as a violation of the antitrust laws." Keith Lawrence, *News Tip: NFL Faces Difficult Fight in Clarett Case*, Sept. 23, 2003, http://www.dukenuews.duke.edu/2003/09/haagentip923.html. For the NFL to succeed in this case Haagen opined, "[I]t will need to demonstrate either that its rule falls within the Rule of Reason, and in fact enhances competition, or that it is incorporated by reference in the Collective Bargaining Agreement between the league and the Players' Association and thus is protected by the non-statutory labor exemption to the antitrust laws . . . . It will be a difficult argument for the league to sustain." *Id.*

On appeal, the Second Circuit Court of Appeals reversed the decision by District Judge Shira Scheindlin in favor of Clarett and his application for entry into the NFL Draft. Despite some scholarly predictions to the contrary, the Second Circuit found that the instant eligibility rule was protected by the non-statutory labor exemption and thus immunized from antitrust challenge. *See Clarett*, 369 F.3d 124 at 138.


bargain with the member clubs and both employers, and the union would have access to information regarding wages, hours and working conditions related to the collective bargaining process. But there is some question as to whether coaches as managers legally can unionize, and market concerns may demonstrate that it would be a disadvantageous proposition. The answers to these questions, discussed in the subsequent sections, help explain why the market for and contracts of NFL coaches vary so widely and why there exists no uniform standard.

A. Unionization of NFL Coaches?

From an information standpoint, NFL clubs and NFL players are on even ground when negotiating player contracts. The NFL Collective Bargaining Agreement (CBA) between the clubs and players expressly establishes certain monetary terms (e.g., minimum salaries and post season pay) and allows for the sharing of salary information among and between the clubs and players in the context of negotiations.\(^7\) It is important to note, however, that the NFL’s CBA also expressly prohibits certain collusive conduct.\(^8\) Unlike NFL players, NFL coaches and franchises do not enjoy the virtually limitless access to current and historical salary information that NFL players access via their union.\(^9\) And, unlike the men they coach, NFL coaches are not likely to secure more complete salary information through unionization.

Coaches may be unable to unionize because “[s]upervisors and managerial employees are excluded from the categories of employees entitled to the benefits of collective bargaining under the National Labor Relations Act.”\(^10\) Coaches could be excluded because they are considered either managers or supervisors.

[The National Labor Relations Act (NLRA)] requires the resolution of three questions; and each must be answered in the affirmative if an employee is deemed to be a supervisor. First, does the employee have authority to engage in 1 of the 12 listed activities [in 29 U.S.C. § 152(11)]? Second, does the exercise of that authority require “the use of independent judgment”? Third, does the employee hold the

\(^7\) NAT'L FOOTBALL LEAGUE, NFL COLLECTIVE BARGAINING AGREEMENT 2002-2008 (2002).
\(^8\) Id. art. XXVIII. Among other proscribed conduct, NFL clubs may not enter into agreements to restrict or limit individual club decision-making (e.g., whether or not to negotiate with players or submit offer sheets).
\(^9\) The National Football League Players Association's (NFLPA) website, www.NFLPA.org, provides NFL players and their agents a wealth of current, historical and supplemental contract information integral to the negotiation of NFL player contracts.
\(^10\) NLRB v. Yeshiva Univ., 444 U.S. 672, 674 (1980).
authority “in the interest of the employer”?  

Coaches engage in many of the activities outlined in 29 U.S.C. § 152(11). Namely, coaches can suspend, layoff, recall, discharge, assign, reward and discipline employees, which includes not only players but other coaches and staff as well. The second requirement – use of independent judgment – is obvious with coaches since the coach is the person held responsible for most decisions, especially those concerning whom to play and not to play and how individual units adjust during games. The third requirement, “in the interest of the employer,” may be a little problematic since it is possible to argue that coaches are working in the interest of the players or for themselves and not just for the employer. However, this argument was not successful in the past and is unlikely to succeed in the context of coaching. In NLRB v. Health Care & Retirement Corp., 1 head nurses claimed that they were not supervisors since they worked in the interest of the patients and not for the employer. The Court thought otherwise and held that the nurses were supervisors. Ultimately, the Court found that the interest of the employer was also the patients’, and thus, the nurses were working in the interest of the employer. In this light, the interest of the coach and the employer would be a successful team, and therefore, like the nurses, coaches are supervisors.

Under the foregoing analysis, coaches appear to be supervisory in nature and excluded from the ability to form a bargaining unit under the NLRA.

Coaches can also be considered managerial employees who are exempt from the NLRA. “Managerial employees are defined as those who ‘formulate and effectuate management policies by expressing and making operative the decisions of their employer.’” The status of this type of employee was not addressed in the NLRA because it was considered “so clearly outside the Act that no specific exclusionary provision was thought necessary.” “Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management.” These employees are excluded because of the concern for the loyalty of

13. Id.
14. Id. at 577-78
16. Id. (quoting NLRB, 416 U.S. at 283).
17. Id. at 683.
management staff between the company and the union. The Supreme Court clarified this standard in *NLRB v. Yeshiva University*. In that case, the Court addressed whether faculty members at a university were considered management. The National Labor Relations Board (NLRB) argued that the faculty was not management because it exercised independent judgment, but the *Yeshiva* Court rejected this test as a way of determining management status. The Court determined that the faculty members were management because the authority exercised by the faculty would be considered managerial in any other situation, and their unique status as faculty, with the ability to make independent judgments, did not alter this determination.

Thus, coaches appear to be excluded from the NLRA as managers. Coaches maintain influence and authority to decide who plays, what system to run, who should be drafted and who should be hired as assistant coaches, among other decisions. If a person that controlled these decisions would be allowed to form a bargaining unit, his loyalty to the unit/union would affect his ability to make decisions that represent the organization. The arguments against qualifying coaches as a recognized bargaining unit finds increased support where a coach, particularly a head coach, is charged with the duties of a general manager.

An argument could be made for some assistant coaches to be deemed non-supervisory based upon the foregoing. However, coordinators who formulate and direct the activities of eleven players at one time and play a role in play calling would most assuredly be deemed excluded. Pat Kirwan, a respected NFL commentator who was also the director of contract administration for the New York Jets, suggests that unionization might be a disadvantageous proposition because the coaching salary market is set from the top down and position coaches and assistant position coaches who might be deemed non-supervisory would lose the leverage they currently enjoy. Kirwan suggests that the expansion of the head coaching market in recent years to include a number of elite college coaching jobs—in 2006, forty-two college football coaches will earn more than $1 million—has helped create greater competition for the services of top head coaches and head coaching candidates.

18. *Id.* at 684.
19. *Id.* at 672.
20. *Id.* at 674.
21. *Id.* at 684.
22. *Id.* at 686.
23. Interview with Pat Kirwan, Senior Analyst, NFL.com (July 21, 2006).
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(predominately, NFL coordinators). Likewise, since head coaches largely pick their staff, there are more opportunities for assistant coaches to make contractual gains because there are more competitors. Kirwan suggests that coaches work in a freer market than do players.

Thus, with many coaches likely excluded from the protections of the NLRA as either a supervisor or a manager, it would seem that unionization would not be possible for the best paid coaches and would be available only to those who command the least market power. According to Kirwan, unionization of only those coaches eligible for collective bargaining might have the unintended effect of setting a wage scale where none already exists, as position coaches and assistant coaches have limited or less power to negotiate their terms already. With barriers to unionization of coaches being both legal and practical, the sharing of information about coaches is restricted. Without the benefit of the statutory and non-statutory labor exemptions, it is not permissible for teams to share salary and contractual information with one another in the manner similar to the way player salary and contractual information is disseminated and published, as it would potentially trigger antitrust violations and the possibility of a conspiracy that would make treble damages possible.

III. A MORE COMPETITIVE MARKETPLACE

A. Player Restrictions

Coaches in the NFL may well operate in a less restrictive labor market than NFL players because teams are prohibited from sharing information and having information as a result of the collective bargaining process. It is also clear that NFL players do have several external restrictions on their contracts,

25. Id. Kirwan points to the movement of NFL coaches to college and the economics of college coaching salaries as creating greater competition for the services of head coaches. Id.

26. Id.

27. Id.

28. Clarett v. Nat'l Football League, 369 F.3d 124 (2d Cir. 2004). The circuit court discusses the origin of the labor exemption for concerted activity between unions and employers. Although "[t]he interaction of the [antitrust laws] and federal labor legislation is an area of law marked more by controversy than by clarity," it has long been recognized that in order to accommodate the collective bargaining process, certain concerted activity among and between labor and employers must be held to be beyond the reach of the antitrust laws. Courts, therefore, have carved out two categories. Id. at 130 (citing Wood v. Nat'l Basketball Ass'n, 809 F.2d 954, 959 (2d Cir. 1987) (citations omitted)).
most notably team salary cap provisions. All player contracts are standardized except for signing bonus language and addenda to various publicity rights. The newly agreed upon NFL CBA will create even more standardization of language in the area of bonus clauses after significant grievance activity in this area. Finally, and perhaps most importantly, NFL player compensation and freedom of movement is subject to team and league salary cap rules and free agency rules that limit how teams spend and structure player contracts and when players may move from team to team.

B. Contributing Factors to the Coaching Market’s Growth

With regard to coaching talent, NFL teams may actually be part of a bigger labor market with the addition of college teams seeking NFL experienced coaches, and there may exist more competition for proven coaches than for players. Several factors influence this. First, the number of coaches believed to have the ability to lead franchises to success are less numerous than talented players based only on sheer number. Furthermore, in the last decade, top college programs have begun paying on a scale equal to the NFL, thus expanding the market to include not just thirty-two NFL head coaching and sixty-four coordinator positions but to also embrace perhaps as many as thirty additional high profile collegiate positions that are competitors

29. See Nat’l Football League, supra note 7, app. C, Standard NFL Player Contract (containing only minor adjustments for choice of law and blanks for salary and years in length).


According to a high-level official at an NFC team, when the NFL Players Association presented the league with its final take-it-or-leave-it collective bargaining agreement in March, the Players Association added a section regarding signing bonuses. Under the previous CBA, each team could negotiate what is called signing bonus forfeiture language. Under the new CBA, clubs now can recoup only 23.5 percent of a player's signing bonus prorated for one season, the team source said. And that goes for players who test positive for drugs, commit a crime, or hold out of mandatory team activities, the source said.

"You see baseball moving toward a 50-game suspension for steroid use," the source said. "You see the NBA and their union agreeing to things like a dress code. And here you have the NFL and the union, which historically have had this positive relationship looking out for the best interest of the game. I don't think it's in the best interest of the game to minimize the penalties for steroid use, holdouts, or motorcycle accidents. The union's come back is, 'We agree there should be a deterrent, but we believe the old deterrent is onerous, just too much.'"

for coaching talent and not for player talent.\footnote{Interview with Pat Kirwan, supra note 23. Kirwan’s comments are supported by those of Bob LaMonte, agent for seven NFL head coaches and Notre Dame’s Charlie West, who regards the current market place for head coaches as including not only the thirty-two NFL teams, but also as many as twenty top collegiate positions. Interview with Bob LaMonte, Founder and President of Professional Sports Representation, Inc. (Nov. 16, 2006).} Second, the majority of successful coaches are represented by a small group of agents and lawyers, so information regarding contracts is closely guarded. Finally, the market has been subject to great volatility, with as many as one-third of the NFL’s franchises making broad leadership changes in the last year. These changes have created, perhaps somewhat counter-intuitively, a sellers market with multiple NFL teams pursuing a finite number of available candidates, much like free agency has done for star players. Additionally, since the implementation of the NFL salary cap in 1993, coaching compensation has grown dramatically; it has become the area where ownership can seek unrestricted coaching resources to better manage financially limited player resources.\footnote{See, e.g., Pat Kirwan, Summer Reading: The Greatest Game Changers, July 7, 2006, http://www.nfl.com/news/story/9544216 (referring to Alex Gibbs as the eighth person who changed the modern game in the NFL the most); Pat Kirwan, Offensive Line a Complicated Need, Apr. 15, 2005, NFL.COM, http://www.nfl.com/draft/story/8387948 (“Renowned line specialists like Alex Gibbs and Jim McNally would prefer second-day picks that they choose themselves.”).} The stunning growth in coordinator compensation exists because teams have begun using highly skilled coaches as a hedge against capped player spending.\footnote{Tom Weir, Big Bucks, No Security for Coordinators on Both Ends, USA TODAY, Aug. 12, 2005, at 1C, available at http://usatoday.com/sports/football/nfl/2005-08-11-nfl-notes_x.htm.}

With so much financially at stake, one would expect the contract process for coaches to be as sophisticated as the player contract negotiation process. However, the executive’s comment at the beginning of this article and a review of the process indicates that it is a process that teams approach somewhat unarmed and feeling overwhelmed.

\textbf{C. Recognition of Coaching Overdue}

With players in a salary capped structure scheduled to earn $102 million under the 2006 salary cap\footnote{See Forbes 2005 NFL Franchise Valuations, FORBES, Sept. 19, 2005, at 122.} and franchise values in excess of $1 billion,\footnote{John Clayton, Salary Cap Status of All 32 Teams, ESPN.COM, Mar. 10, 2006, http://sports.espn.go.com/nfl/news/story?id=2349505.} Kirwan suggests that compensating the individuals who direct the activities of fifty-three players and the various sub-units of the team is an idea that is somewhat overdue. “Paying individual players with contracts that are valued in the hundreds of millions,” Kirwan said, “makes it clear that paying coaches without compensating the individuals who do the same work is an idea that is somewhat overdue.”
who direct units on the team more than the veteran [player] minimum is an easy decision." The NFLCA indicates that owners are just now embracing this concept, as NFL coaches’ salaries collectively are only edging over the NFL rookie player minimum contract of $275,000 as of 2006.

The recent and somewhat overdue escalation of coaching compensation has not occurred solely on the basis of the market recognizing the value of coaching but rather because several factors have coalesced to drive the marketplace forward. Kirwan points to the implementation of the player salary cap as the turning point where club owners and high level managers began looking to acquire coaching talent as a tool, not regulated by the salary cap, to gain a competitive edge. Kirwan has written on several occasions regarding the hiring of a particularly experienced position coach or coordinator enabling an organization to operate with less costly players, more cap-friendly players, or both. Offensive line coach Alex Gibbs, now of the Atlanta Falcons and formerly of the Denver Broncos, has been hailed as an example of one who can produce a superior unit because of the scheme he employs rather than the individual skills of his players. Similarly, a great deal of the success of the New England Patriots has been attributed to the innovative coaching of Bill Belichick and his staff who use schemes and team concepts rather than the overwhelming superiority of their players. The recognition that head coaches are significant may have come when free agency became prevalent, according to Kirwan, and it was the head coaches who remained as players moved on. Assistant coaches became more important when player salaries became capped. So, are coaches at all levels just talent that are part of a moveable, broader competitive marketplace?

D. Expansion of the Coaching Market

The decision in Five Smiths, Inc. v. National Football League Players Ass’n recognized that professional sports’ labor markets are far from truly free. Players enter in certain strata and their earning power is based upon

37. Interview with Pat Kirwan, supra note 23.
39. Interview with Pat Kirwan, supra note 23.
40. See sources cited supra note 34.
42. Interview with Pat Kirwan, supra note 23.
44. Id. at 1053 (rejecting NFL argument that exchange of player compensation data and information regarding current offers by agents and the decertified NFLPA violated Section 1 of the
their movement from one strata to another, for example, from drafted rookie to
starting player to potential free agent. Similarly, the coaching market in the
NFL was not as free as it currently until several trends changed the
landscape of collegiate football in the last decade. Kirwan points to a number
of significant changes that enabled coaches who had been associated with the
professional game to move seamlessly to college football, thereby expanding
the market for coaching talent. Previously, said Kirwan, "It was recruiting
that drove college coaches to the pros," referring to the overwhelming pressure
to bring in top quality student-athletes as recruits. "Now, it is recruiting of
free agents that is driving pro coaches back to college." Kirwan clarifies this
statement by saying that the National Collegiate Athletic Association’s (NCAA)
rules governing recruiting have reduced the amount of contact that
coaches can have with prospective student-athletes, consequently reducing the
time college head coaches must devote to recruiting. At the same time,
Kirwan points out that the NFL has become much more of a 365-day
business.

Camps open in July. The regular season ends in January, giving way
to the playoffs and to the evaluation of draft prospects in January and
February. The free agent signing period opens in March. April brings
the draft and another flurry of free agent signing. The months of May
and June bring mini-camps and off-season conditioning. July brings
negotiations of draft choice contracts and training camp opens again.

Kirwan suggests that many of these duties rest not only on the shoulders
of head coaches but also now fall on coordinators and position coaches who,
in the era of free agency, are increasingly involved in recruiting players to
their team.

E. NFL Experience Becoming a Decided Advantage in the NCAA Ranks

As pressures in collegiate coaching have eased and NFL coaching burdens
have mounted, the fluidity with which coaches move from the NFL to college
has increased. Kirwan cites the collaborative nature of the NFL, where

45. Interview with Pat Kirwan, supra note 23.
46. Id.
47. Id.
48. Id.
49. Id.
50. Id.
51. Id.
owners, general managers and personnel all weigh in on critical decisions as a key motivating factor. "You get to pick your own players in college and you don’t have to manage a cap." The success of Pete Carroll at the University of Southern California and Nick Saban at Louisiana State University, both experienced NFL coaches before moving to the college ranks, has created a perception that having a coach with NFL experience provides the school with an edge in recruiting and coaching. Syracuse Athletic Director Daryl Gross, in announcing the hiring of former veteran NFL defensive coordinator Greg Robinson, publicly noted this perceived recruiting advantage and conducted an extensive national search for "a defensive-minded [head] coach with both NFL and college experience." Kirwan puts it succinctly, "Top high school players aspire to play in the NFL and whom better than an NFL-experienced coach to help guide them toward that goal." Recent professional coaches taking jobs in the collegiate ranks include not only Carroll, Saban and Robinson, but also Bill Callahan from the Oakland Raiders to the University of Nebraska, Karl Dorrell from the Denver Broncos to UCLA, Charlie Weis from the New England Patriots to the University of Notre Dame, Dave Wannstedt from the Miami Dolphins to the University of Pittsburgh and, even though he is better known as a collegiate coach, Steve Spurrier from the Washington Redskins to the University of South Carolina. "In the PAC-10 alone, five head coaches have significant NFL experience: Oregon State’s Mike Riley was the Chargers’ coach; USC’s Pete Carroll coached the Patriots and the New York Jets; Stanford’s Walt Harris was the Jets’ quarterbacks coach; UCLA’s Karl Dorrell coached receivers with the Denver Broncos; and Washington’s Tyronne Willingham was a Minnesota Vikings running backs coach." The door also swings back the other way as Saban has returned to the NFL ranks as head coach and head of football operations for the Miami Dolphins. And, with 2006 regular season games still remaining for the Arizona Cardinals and the University of Southern California (USC) Trojans, it has already been reported that Pete Carroll has received “feelers” about his interest in coaching the Cardinals in 2007.

52. Id.
54. Interview with Pat Kirwan, supra note 23.
The movement of Jim Herrmann this year is illustrative of what may be a new path to ascending to collegiate head coaching positions. After twenty seasons at the University of Michigan, the last nine as defensive coordinator, Herrmann, whose tenure at Michigan was highlighted by a national title in 1997 and the Frank Broyles Award for the top assistant coach on the collegiate level, seemingly made a downward move to become the linebackers coach of the New York Jets.\footnote{Jim Herrman Biography, http://www.newyorkjets.com/coaches/jim-herrmann/ (last visited Oct. 13, 2006).} Herrmann, just forty-five years of age and a former Michigan standout player, would seem to have the resume that would mark him as an excellent candidate for virtually any collegiate head coaching vacancy in recent years, and yet, he made the move to become a position coach in the NFL without getting serious head coaching consideration. Herrmann may be proving Syracuse’s Gross and Kirwan correct in that career college coaches must now pay NFL dues to be considered candidates for top vacancies in the NCAA. Similarly, only three of the ten winners of the annual Broyles Award as the top assistant in college football coaching have become a collegiate head coach, providing some evidence that the advantage in the pursuit of college football head coaching jobs now lies with NFL coaches.\footnote{Past Winners, http://www.broylesaward.com/html/about.html (last visited Oct. 12, 2006).} The net of this movement has expanded the number of jobs an NFL coach can consider and potentially the number of bidders for his services.\footnote{Ted Miller, \textit{College Coaches Breathe Easier}, \textit{Seattle Post Intelligencer}, Nov. 12, 2005, at D1. College coaches’ compensations at elite programs are benchmarked at $1.5 million annually, and they enjoy a modicum of stability as 2005 did not include a marquee firing and coaching search.} And with approximately seventy percent of major colleges running and defending against pro-style offenses, the skill sets of NFL and major college coaches are gradually becoming more fungible,\footnote{King, \textit{supra} note 55 (Experienced and respected NFL journalist Peter King observes that the increasing similarities between the NFL and major college football account for the considerable number of coaches moving back and forth between college and the pros these days.).} a circumstance that expands the job market for professional and college coaches alike.

\subsection*{F. More Jobs, More Competition for Top Talent}

The expansion of the coaching marketplace also expands the role of agents or representatives for a coach in both charting the coach’s career and in seeking out potential opportunities and offers for their clients. Bob LaMonte,
a coaches agent based in Reno, Nevada, is considered one of the most influential people in his field. He has been featured on 60 Minutes and has written a book, Winning the NFL Way: Leadership Lessons from Football's Top Coaches, that has been featured as a text in college classes on leadership. LaMonte has specialized in getting his clients opportunities in the NFL, representing seven current NFL coaches. But, after the 2004 season, LaMonte assisted perhaps his hottest NFL assistant, New England offensive coordinator Charlie Weis, in securing the vacant head coaching position at the University of Notre Dame. Weis had previously been a contender for several head coaching vacancies in the NFL after coordinating New England's offense during three Super Bowl victories in four years. But he opted instead to return to his alma mater to revive fortunes of the fabled South Bend, Indiana school. He was so successful that LaMonte convinced Notre Dame to extend Weis's original contract after only seven games into his first season. It was in no small part because LaMonte successfully convinced Notre Dame of the prospective NFL interest in Weis after his fast start. So for LaMonte and another leading coaches agent, Gary O'Hagan, who is believed to represent many current NFL and collegiate clients, the threat of more potential employers (both in the NCAA and the NFL) making viable offers to their clients makes their jobs easier. Additionally, colleges offer another level of competition as they are not subject to the NFL's restrictions on tampering (discussed in detail later in this article) and thus are free to speak to coaches about their vacancies without limitation.

62. Prof'l Sports Representation, Inc., Clientele, http://www.psr-inc.net/index.php?click=clientele (last visited Sept. 29, 2006) (listing seven current NFL head coaches: Brad Childress (Minnesota); John Fox (Carolina); Jon Gruden (Tampa Bay); Mike Holmgren (Seattle); Jim Mora (Atlanta); Mike Nolan (San Francisco) and Andy Reid (Philadelphia), fourteen current NFL coordinators or assistant head coaches, and nine management personnel as clients).
64. Id. Weis concedes he knew "people would start talking about things like the NFL." Id.
65. Liz Mullen, IMG Coaches Agent O'Hagen Adds First NBA Client and is Looking for More, SPORTS BUS. J., Sept. 29, 2003. Mullen writes that "[s]ince coming to IMG in December 2000, O'Hagan has built an impressive practice representing NFL coaches." Id. O'Hagan refuses to say how many he represents but Mullen lists Marty Schottenheimer, Jack Del Rio, Dennis Green, Tom Coughlin and former coaches Steve Mariucci and Bill Callahan, now at Nebraska, as clients. Id. Kansas City's Herman Edwards has also been attributed to being an O'Hagan client. Rich Cimini, OVER & OUT, N.Y. DAILY NEWS, Jan. 1, 2006, at 50.
G. Too Much Influence, Too Much Information

With LaMonte and O'Hagan representing nearly half (currently fourteen or fifteen) of the thirty-two NFL head coaches and an increasing number of coordinators and collegiate coaches, the question becomes, do they have too much influence, too much information and too much ability to play the interest of market participants against one another? Sports Pickle, a web sports satire, in a mocking column wrote, after LaMonte succeeded in getting Weis an extension after only seven games, that if Notre Dame had a halftime lead in its bowl game, LaMonte would have thirty-five NFL offers awaiting Weis (never minding there are only thirty-two NFL teams), unless he got yet another new contract from Notre Dame.66  USA Today quoted O'Hagan as saying, with coordinators, "I think you’ve developed a segment of the market which is almost like a three- or four-star general. He may not be the commander in chief, but he’s extremely valuable."67  This may be because agents have successfully promoted their coordinator clients and successfully used the interest of other teams both in the NFL and college to cause their salaries to jump dramatically, as the USA Today story credits LaMonte for achieving for his client, then Jet offensive coordinator Mike Heimerdinger.

Coordinators’ salaries have skyrocketed since the 2001 NFLCA survey placed the average pay for coordinators at less than $350,000.68  Entering the 2005 NFL season, agents could point to about fifteen coordinators earning more than $1 million dollars.69  Perhaps the phrase agents “could point to” is meaningful as Weir could not get team sources to confirm these numbers and rather relied upon the agents. This is at least anecdotal evidence that the agents may have better information than the clubs because of the antitrust restrictions and competitive relationship between the market participants. There is no evidence that agents have cooperated with one another in a Five Smiths scenario.70  LaMonte, O'Hagan and the others who have NFL clients appear to be in serious competition with one another.

Incomplete information resulting from certain teams being rumored to deny their coaches permission to participate or inaccurate reporting is a problem for both sides unless there are multiple interested bidders on the franchise level. It stands to reason that if one person represents multiple

67.  Weir, supra note 33.
68.  Id.
69.  Id.
clients in the same position, as head coaches, coordinators or position coaches, he or she would have increased knowledge, but Kirwan suggests that benchmarking amongst colleagues is a common practice in the league.\footnote{1}{Interview with Pat Kirwan, supra note 23.}

As to the issue of the influence of agents, there is no power in an auction market unless there are bidders, Kirwan suggests.\footnote{2}{Id.} Saying that an agent’s influence does not exist “until someone (a team owner or athletic director) calls wanting to hire [his or her] client,” Kirwan downplayed the agent’s power and knowledge in comparison to the clubs.\footnote{3}{Id.} While questioning the overall influence of agents, he does suggest that some, like LaMonte, are very successful at leveraging opportunities for their clients and getting their clients media attention.\footnote{4}{Id.}

\section*{H. A Different Posture from Ownership}

Another key difference, Kirwan suggests, is that owners and team management take a different posture with regard to coaching contract negotiations than they do with regard to player contracts.\footnote{5}{Id.} Owners play an active role in the selection of the head coach, and they, as LaMonte indicates, do not like to not get their first choice.\footnote{6}{Id.} In the capped world of player contracts, it is becoming apparent that the best available player in the irrational market of free agency is not always the best fit for a team with salary cap restraints.\footnote{7}{Id.} Enlightened owners can now see the wisdom of passing on a player who will tilt their salary cap away from competitiveness. However, owners do not want to face the public embarrassment based upon unending newspaper and sports radio speculations of failing to secure the head coach of their choice.\footnote{8}{Id.} Accordingly, contract negotiators at the general manager level or lower may not have the authority or discretion to not get a deal done with a coach. Kirwan suggests that this mandate to “get the candidate” also trickles down with regard to position coaches and coordinators.\footnote{9}{Id.} “It is not acceptable

\footnote{1}{Interview with Pat Kirwan, supra note 23.}
\footnote{2}{Id.}
\footnote{3}{Id.}
\footnote{4}{Id.}
\footnote{5}{Id.}
\footnote{6}{Bob LaMonte, Speech to Leadership Class at New York University (Dec. 11, 2003).}
\footnote{7}{Boland, supra note 41.}
\footnote{8}{Kurt Kragthorpe, Donovan Made Big Assist with Meyer Recruitment, SALT LAKE TRIB., Dec. 7, 2004, at B1. Florida’s Athletic Director, hoping to avoid the public spectacle involving his unsuccessful recruitment of Mike Shanahan and Bob Stoops, flew from Vermont and then chartered to Utah in his successful recruitment of Urban Meyer in 2004.}
\footnote{9}{Interview with Pat Kirwan, supra note 23.}
in most cases to come back to the owner or team executive and say the coach wants too much, I lost him,” Kirwan says. With coordinators at the “three- or four-star general” level as O’Hagan suggests, owners may not be in a position to “say no” to most of their demands. Similarly, Kirwan indicates that most head coaches insist on forming their staffs, so again, the teams do not have real ability to deny their new commanders in chief the opportunity to decide who will assist them. This may help to explain some of the frustration the team executive, mentioned earlier, spoke of in describing his feeling of being unarmed. Rather than being unarmed, the negotiator has been disarmed because he or she has, for the most part, lost the leverage of passing on a candidate.

I. A Strategic Turn

Kirwan also echoes O’Hagan’s quote from USA Today, “[I]f the owner really wants to make a difference, the one place he can do it is by spending more money on his coaching staff.” The example of Washington Redskins owner Daniel Snyder, who has the most valuable team ($1.264 billion) and highest annual revenues ($287 million) of any NFL team, is illustrative. The Redskins in the past two off-seasons added coordinators at salaries believed to be in excess of $2 million annually. This may be a strategic move from an owner seeking to press his obvious advantage against his competitors. While Snyder may have virtually unlimited resources to enlarge his coaching staff, competitors’ valuations equal to half the Redskins’ valuation and revenues of more than $100 million less may have real difficulty matching this pace, allowing Snyder to accumulate great talent and push his competitors to make costly mistakes. Kirwan calls this “Steinbrennerism,” based on baseball’s New York Yankees owner’s strategy for collecting and continuing to maintain top players because other teams cannot match his payroll. If Snyder is using “Steinbrennerism” to gain an advantage on his fellow owners and competitors, it represents a decided market shift away from the trend on the players side.

80. Weir, supra note 33.
81. Interview with Pat Kirwan, supra note 23.
82. Weir, supra note 33.
83. See Forbes 2005 NFL Franchise Valuations, supra note 36, at 122.
85. The number 26-32 ranked franchises are valued at less than $700 million and annual revenues for teams ranked number 18-32 are at less than $187 million dollars or more than $100 million less than Washington. Interview with Pat Kirwan, supra note 23; Forbes 2005 NFL Franchise Valuations, supra note 36, at 122.
where owners are urged to eschew free agents using a "Moneyball" approach. But "Steinbrennerism" impacts the marketplace in many ways. Owners will overpay, fearing they will lose candidates to lesser-titled offers by teams like Washington. Similarly, owners, and by extension colleges, will be forced to match the market Washington sets, and it will impact their spending in other areas.

J. Who Is Hurt By More Information

If clubs are possibly helped by more freely disseminated information, will there be an injured party, possibly the agents or even the colleges? With regard to agents, LaMonte is fairly forceful in answering that he will not be hurt by broader knowledge, stating that the foundation of his client relationships is trust, boldness and fiduciary duty.

In fact, if negotiators have lost the ability to say no, as it appears, and with the informal benchmarking that is common in the NFL, negotiations that must end in the acquisition of coaching talent will rise as long as there are multiple bidders. Colleges may have something greater at stake as staff salaries rise, but again, as long as salaries serve as a market broadening force, they will remain vital as coaches continue to pass through college ranks and back to the NFL in search of opportunities, as Nick Saban did in 2005, and others may do after the 2006 season.

IV. NFL ANTI-TAMPERING POLICY

The NFL maintains a comprehensive Anti-Tampering Policy (Policy) that establishes the framework for clubs to consider coaching candidates from its most fertile and qualified candidate pool, current NFL coaches. Since most NFL coaching positions are filled on or before the end of January, and most NFL coaching contracts expire no less than a year from the date of hire, the vast majority of NFL coaches interviewing for new jobs are under contract with another team during this time. Consequently, the Policy is almost always applicable to a current NFL coach. As club representatives, coaches are also subject to the Policy's proscriptions regarding NFL players.

A. Background

The Policy, which applies to both players as well as non-players, was

86. Boland, supra note 41.
87. LaMonte, supra note 76 (emphasizing the notion of boldness, calling it a "sack").
88. Id.
passed to act as a stabilizing force within the NFL. Tampering is defined as "any interference by a member club with the employer-employee relationship of another club or any attempt by a club to impermissibly induce a person to seek employment with that club or with the NFL."\textsuperscript{89} In relation to players, the Policy's goal is to "protect member clubs' contract and negotiating rights" while "allow[ing] the intra-League competitive systems devised for the acquisition and retention of player talent . . . to operate efficiently."\textsuperscript{90} Moreover, as applied to non-players, the Policy serves to "strike a balance between protecting the rights and maintaining the organizational stability of employer clubs, and providing realistic advancement opportunities for employees if other clubs desire their services."\textsuperscript{91} Former NFL Commissioner Paul Tagliabue, who issued the appropriate disciplinary measures at his discretion,\textsuperscript{92} had on occasion enforced the Policy by issuing hefty fines and draft pick compensation.\textsuperscript{93} There exists, however, a significant grey area within which potential player and coach free agents and their respective representatives operate.\textsuperscript{94}

As the NFL has matured and developed, the Policy has undergone a number of significant changes designed to address the current state of the NFL. Specifically, the owners have recognized the need to "soften" the Policy in order to provide greater opportunity for assistant head coaches to ascend in the NFL, especially those of minority descent.\textsuperscript{95} Arguably, the Policy's requirements have historically inhibited the rise of coaches within the NFL, yet have had little effect on players. Perhaps the most plausible explanation for this circumstance is that although the Policy prescribes strict and uniform evidentiary standards for proving violations, evidence is easier to establish in the cases involving coaches.\textsuperscript{96} Notwithstanding, the Policy has served its
purpose of promoting integrity within the NFL by limiting instances of tampering.97 A brief review of the NFL’s application of this Policy to players and club employees is relevant and instructive for its application to coaches.

B. Application to Players

i. College Players

The Policy clearly limits the dialogue between NFL club personnel (including coaches) and collegiate athletes who have yet to declare for the draft. Specifically, personnel may not “attempt[] to induce underclassmen to petition the League for special eligibility or to declare to the League their desire to enter the League under the early-graduation rule.”98 Moreover, club personnel are not allowed to make public comments detailing the “football ability or NFL potential of underclassmen.”99

ii. NFL Players

Clubs are prohibited from tampering with NFL players who are “under contract to or whose exclusive negotiating rights are held by another club.”100 This can involve private meetings or conversations with a player under contract or even public or private statements of interest in another club’s player.101 For example, in 2005, former Philadelphia Eagles wide receiver Terrell Owens was suspended for four games and eventually deactivated for

with Lawyer Milloy’s agent prior to his release from the New England Patriots, the NFL did not punish the Redskins due to a lack of evidence.


98. NAT’L FOOTBALL LEAGUE, supra note 89, at 2. Student-athletes eligible under the early graduation rule can still solicit the League prior to declaring for the NFL draft in January: “If four seasons have not elapsed since the player discontinued high school, he is ineligible for selection, but may apply to the Commissioner for special eligibility.” Id. art. XII, § 1(A). See Clarett v. Nat’l Football League, 369 F.3d 124 (2d Cir. 2004) (holding NFL’s eligibility rules, which required Clarett to have been more than three full college football seasons removed from high school in order to apply for special eligibility, were shielded from antitrust laws and thus enforceable).


100. Id.

101. Id. at 3. "Any public or private statement of interest, qualified or unqualified, in another club’s player to that player’s agent or representative, or to a member of the news media, is a violation of this Anti-Tampering Policy." Id.
the remainder of the season. While Owens was still suspended, Dallas Cowboys owner Jerry Jones arguably expressed interest in signing the controversial Owens during an interview on a local radio station. The Eagles subsequently filed a complaint claiming Jones's conduct was in violation of the Policy. Although the Eagles eventually withdrew their claim, the possible effect of Jones's words invoked what is at the heart of the Policy. Under the Policy, if Owens was subsequently involved in a contract dispute with the Eagles, the Cowboys could have been guilty of tampering regardless of whether his dispute emanated from Jones's comments on the air: "[T]ampering will be found even in the absence of a demonstrated cause-and-effect relationship between the player's contract problems and his prior involvement with the other club." Communication between a club and a player who could possibly be released is also a violation of the Policy. Only when the player is released or becomes a free agent can the team discuss employment. In 2003, safety Lawyer Milloy stated in an interview that the Washington Redskins negotiated and made an offer before he was released by his then current team, the New England Patriots. Milloy stated that his agent, Carl Poston, had initiated contact with the Redskins. This act was in direct violation of the Policy which states:

If a club is contacted by a player (or his representative) who is under contract to or whose negotiating rights are held by another club, and such player had not been given permission to deal with other clubs, or such player is not in a permissible negotiating period under the terms of an operative collective bargaining agreement, then the contacted club is prohibited from talking or otherwise dealing with the player or

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102. Eagles File Tampering Complaint Against Cowboys, supra note 97.
103. Id. In response to whether the Cowboys may be interested in Owens, Jones stated, "In general, I am a risk taker. We've gone down that road. I probably have a propensity to try and make things work . . . . A top receiver could flourish with Drew Bledsoe. That's always appealing." Id.
104. Id.
105. NAT'L FOOTBALL LEAGUE, supra note 89, at 2.
106. Id.
107. Id. at 2-3.
108. Id. at 3; Peter King, Questionable Timing: NFL May Investigate Milloy's Contact with Other Teams, CNNSi.com, Sept. 7, 2003, available at http://sportsillustrated.cnn.com/2003/writers/peter_king/09/06/milloy.fallout/index.html. It is also a violation of the NFL's Anti-Tampering Policy to contact a player or his agent when he still sits on waivers: "If a club is contacted by a player or his representative during this period, the only permissible response by the club is to inform the player or his representative that the club is not allowed under NFL rules to speak to him." NAT'L FOOTBALL LEAGUE, supra note 89, at 3. Milloy most likely did not realize the impact of his words and the possibility of the Patriots filing an anti-tampering claim.
his representative.\textsuperscript{110}

The Redskins subsequently denied the accusations, claiming they were contacted only after Milloy was cut.\textsuperscript{111} If Milloy’s statements were true, the Patriots were disadvantaged in their negotiations with Milloy since the player was emboldened with information that a lucrative offer awaited upon his release.\textsuperscript{112} Despite Milloy’s statements confirming his agent’s contact with the Redskins, the NFL did nothing to punish the Redskins due to a lack of evidence.\textsuperscript{113} The Milloy and Owens examples demonstrate that player tampering claims are difficult to prove.

The NFL Scouting Combine (Combine) is fertile ground for tampering involving players, coaches and their representatives. The Combine is the NFL’s annual scouting meeting that is held in Indianapolis every February prior to the start of the new NFL year and free agency. Nearly every NFL coach and club executive attends the Combine. The NFLPA also holds a meeting in conjunction with the Combine, which is attended by five hundred or more veteran NFLPA-certified player agents. Consequently, the vast majority of player and coach deal-makers are in one location prior to the start of player free agency and finalizing of coaching staffs.\textsuperscript{114} At the time of the Combine, potential free agents remain under contract with their current clubs. Their agents, who may represent other athletes at the Combine, are nevertheless courted by club executives.\textsuperscript{115} Such was the case in February 2001 when the start of free agency was moved back to “allow new head coaches hired in late January or early February more time to assemble a staff,”\textsuperscript{116} and the Combine served as the unofficial start of free agency negotiations.\textsuperscript{117} Commissioner Tagliabue had little to say on the tampering issue since no teams brought claims, mainly because each was most likely walking a “fine line.”\textsuperscript{118}

\begin{footnotes}
\item[110.] \textit{NAT'L FOOTBALL LEAGUE}, supra note 89, at 3.
\item[111.] King, supra note 108.
\item[112.] \textit{Id.}
\item[114.] The environment of the Combine is not unlike that of Senior Bowl practice week every January in Mobile, Alabama, during which most of the NFL deal-makers ostensibly gather to watch the practices of college football’s best senior prospects. Senior Bowl week has become such a notorious job fair for players, coaches, executives and agents; some clubs have refused to allow their coaching staffs to attend.
\item[115.] Pasquarelli, supra note 94.
\item[116.] \textit{Id.}
\item[117.] \textit{Id.}
\item[118.] \textit{Id.}
\end{footnotes}
In 2006, after the start of free agency was again pushed back to accommodate the negotiation of a new collective bargaining agreement, there were a flurry of signings in the early hours of free agency. Former Miami Dolphins Vice President of Player Personnel Rick Spielman, who previously stated that a delayed free agency start would push the Combine into "absolute craziness," "marveled" at the quick signings in light of the Policy. Spielman's sarcasm highlights the folly of the Policy's application during the Combine. While players, agents, and NFL executives are all cognizant of the anti-tampering rules, it is obvious that they are willing to quietly disregard such restrictions in order to get a head start in the free agency process. The NFL's laissez faire application of the Policy to players contrasts with its aggressive application to coaches.

C. Application to Non-Players

The Policy groups non-players into four categories: (1) head coaches, (2) assistant coaches, (3) high-level club employees, and (4) other club employees. Clubs interested in hiring a non-player employee of another club, whether that employee is under a contract or not, must follow proper protocol to express their interest. This involves "notify[ing] the owner or operating head of the employer club" of its interest. While the NFL has amended some of its policies to facilitate the hiring process of assistant coaches seeking head coaching positions and is considering doing the same with mid-to-lower level club employees looking to further ascend in the ranks, it has retained stringent rules with regard to both head coaches and other high-
level club employees.

i. Head Coaches

NFL head coaches have limited room to pursue other employment positions while under contract.\(^{126}\) During the club’s playing season, head coaches have no opportunity to seek or accept other employment unless they are terminated.\(^{127}\) In the off-season, a head coach under contract is still prohibited from seeking or accepting employment unless: (1) he is dismissed; (2) “his club has granted him permission to explore other employment opportunities”; or (3) “his club has granted another club the opportunity to contact him.”\(^{128}\) The head coach’s current club is not obligated to grant permission to another club.\(^{129}\) A head coach can avoid these potential roadblocks by “negotiat[ing] into his contract a right to such off-season permission.”\(^{130}\) Conversely, a club can protect itself by “negotiat[ing] a right of first-refusal” into the head coach’s contract.\(^{131}\)

In 2001, Commissioner Tagliabue ruled on an important tampering claim initiated by the St. Louis Rams. Following the 1999 season after his club won the Super Bowl, Rams Head Coach Dick Vermeil announced his retirement.\(^{132}\) At that time, Coach Vermeil’s contract with the Rams extended through the 2001 season.\(^{133}\) Although the Rams were under no obligation to do so, the club replaced Coach Vermeil’s coaching contract with a consulting agreement that paid him $2 million over the following four years.\(^{134}\) The new consulting agreement expressly provided that Coach Vermeil was “terminated” as the Rams’ head coach.\(^{135}\) Approximately a year after the Rams’ Super Bowl victory, Vermeil was rumored to have engaged in discussions with the Kansas City Chiefs to fill their head coaching vacancy.\(^{136}\) The Rams learned of these negotiations and filed a tampering claim against the

\(^{126}\) Id. at 5 (“All head coaches in the NFL must be under contract to perform coaching duties at training camps and during the rest of the playing season.”).

\(^{127}\) Id. at 4. A season includes the post-season of the club for which the coach coaches but not the Pro Bowl.

\(^{128}\) Id.

\(^{129}\) Id.

\(^{130}\) Id.

\(^{131}\) Id.


\(^{133}\) Id.

\(^{134}\) Id.

\(^{135}\) Id.

\(^{136}\) Id.
While Commissioner Tagliabue recognized that the agreement did not prohibit Vermeil from seeking head coaching positions with other clubs in 2000 and 2001, he ruled that "the clear purpose and effect of the [Rams' consulting] agreement . . . was that Vermeil would remain retired from coaching through the 2001 season." Thus, Commissioner Tagliabue awarded the Chiefs' second and third round draft picks to the Rams and ordered Coach Vermeil to pay back the fees he received from the first year of his consulting contract. The Chiefs' conduct did not technically violate the Policy, since Vermeil should have been characterized as a mid-level club employee ("other club employee"); he was a consultant, not a coach, and was given less responsibility than a club president or general manager, both of whom are considered high-level club employees under the Policy. Notwithstanding, with the spirit and integrity of the Policy at stake, Commissioner Tagliabue ruled in favor of the Rams. Notably, Commissioner Tagliabue considered the Rams' intentions in his determination that a violation took place.

In December 2002, another tampering dispute involving a head coach stirred the NFL when the Tampa Bay Buccaneers sought compensation after they claimed to have signed former head coach Bill Parcells to a multi-year deal. The Buccaneers maintained that Coach Parcells signed a coaching contract with the club in January 2002. Shortly thereafter, Coach Parcells decided not to coach the team. Almost a year later, Coach Parcells met with Dallas Cowboys owner Jerry Jones to discuss the Cowboys' head coaching vacancy. The Buccaneers' general manager at the time, Rich McKay, informed the clubs that wanted to meet with Coach Parcells that they needed to first receive permission from the Buccaneers "in accordance with the NFL anti-tampering rules." While Commissioner Tagliabue recognized that the Buccaneers had a "substantial claim," he limited the team's recourse to seeking damages against only Coach Parcells. Commissioner Tagliabue

137. Id.
138. Rams Say They're Satisfied with Compensation, supra note 93.
139. Id. Vermeil was forced to pay back $500,000.
140. As discussed later in Section III-D, since Vermeil was a consultant he would have been allowed to discuss employment opportunities with other teams. The Rams could only deny permission if Vermeil's primary consulting responsibilities revolved around a recurring event during the time of his interviews, which occurred in late December and early January.
141. Stroud, supra note 97.
142. Id.
143. Id.
144. Id.
145. Rick Stroud, Cowboys Owe Bucs Nothing, ST. PETERSBURG TIMES, Jan. 3, 2003, at 4C,
reasoned that the coaching contract was never filed with the NFL office and thus was not recognized by the NFL.\textsuperscript{146} The Buccaneers eventually dropped their claim entirely.\textsuperscript{147}

The scope of conduct subject to the Policy was evidenced in 1998. That year, Cleveland Browns CEO Carmen Policy triggered the Policy's sanctions after being asked at a luncheon whether the Browns would be interested in hiring head coach Mike Holmgren. At that time Coach Holmgren was under contract with the Green Bay Packers.\textsuperscript{148} Although Policy prefaced his response by stating that any comment "would be tampering," he then proceeded to intimate his club's potential interest.\textsuperscript{149} Policy quipped, "Let's just say if a head coach who's out there, who has won a Super Bowl, who has been to another Super Bowl, who is coaching a team in contention for the playoffs this year, who is an offensive-minded coach, looking to perhaps move when the season's over, were to be interested" the Browns would also be interested.\textsuperscript{150} The Policy specifically states that "any public or private statement of interest in another club's employee is a violation."\textsuperscript{151} Thus, despite the luncheon crowd's laughter in response to Policy's rather innocuous humor, the NFL got the last laugh, issuing a $10,000 fine against the Cleveland Browns.\textsuperscript{152}

\[\text{ii. Assistant Coaches and the Birth of the Rooney Rule}\]

While the Policy plainly restricts the ability of head coaches to pursue employment with other teams during the season, it also recognizes the need for advancement within the league and thus provides a less stringent policy for assistant coaches pursuing head coaching positions. Generally, assistant coaches under contract are not allowed to seek or accept employment with another club in the league \textit{during the season}, unless they are terminated.\textsuperscript{153} Historically, if assistant coaches were being considered for a head coaching position, the rules allowed for only limited contact between the employer club and the hiring club until the season was over.\textsuperscript{154} This communication

\bibliography{marquette-sports-law-review-2017}

\begin{thebibliography}{99}
\bibitem{146} \textit{Id.}
\bibitem{147} \textit{Id.}
\bibitem{148} \textit{NFL Fines Carmen Policy $10,000, supra note 97.}
\bibitem{149} \textit{Id.}
\bibitem{150} \textit{Id.}
\bibitem{151} \textit{Id.}
\bibitem{152} \textit{Id.}
\bibitem{153} \textit{NAT'L FOOTBALL LEAGUE, supra note 89, at 5.}
\bibitem{154} \textit{Id. at 6.}

\end{thebibliography}
involved the hiring club relaying its interest to the employer club, which then advised the coach of the interest. The coach would then advise the employer club whether or not he was interested in the position, after which the employer club would relay the message back to the hiring club. Thus, there was no direct contact between the assistant coach and the hiring club.

The Policy's prescribed limitation on communication subsequently changed with the implementation of the Rooney Rule. In 2002, the NFL’s Committee on Workplace Diversity (Committee), led by Pittsburgh Steelers’ owner Dan Rooney, recognized the dearth of minority head coaches in the league. The Committee concurrently observed that the minority coaches who made it to the head coaching level were extremely successful. The Committee believed that a key reason for the lack of minority coaches was the Policy. Many minority assistant coaches worked as offensive and defensive coordinators of successful teams whose seasons ran deep into the playoffs. Since teams were prohibited from interviewing those coaches until their teams were eliminated, they hired other candidates. Clubs feared that potentially waiting until the end of the Super Bowl “might affect their ability . . . to hire assistant coaches to fill a particular coach’s staff, or more importantly, [possibly] affect [their] capability to prepare adequately for the NFL Draft in April.” The Committee subsequently issued its recommendations to promote diversity within the coaching ranks, stating “any club seeking to hire a head coach [must] interview one or more minority applicants for the position. The one exception [would] occur[] when a club has made a prior contractual commitment to promote a member of its own staff and no additional interviewing takes place.” These recommendations are

155. *Id.*
156. *Id.*
157. *Id.* The authors are aware of instances where NFL assistant coaches were never advised of another club’s interest in the coach or the inquiring club was falsely led to believe that the assistant coach was either not interested or contractually unavailable to the inquiring club.
161. *Id.* at 239.
162. *Id.*
163. *Id.*
164. *Id.*
165. Press Release, Nat’l Football League, *supra* note 95. The Rooney Rule is supported by the following guidelines, condensed from their original version:

(1) "prior to beginning the interview process, a club should prepare a job description that clearly
commonly known as the Rooney Rule.

Based on the Committee’s recommendation, the NFL additionally amended the Policy to allow a club with a vacant “head coaching position to request permission to conduct one interview with an assistant coach employed by a playoff team when that club has a playoff bye or has a wild card playoff game.” 166 This initial amendment allowed assistant coaches with a bye week to interview through Friday of the first round of the playoffs and granted assistant coaches whose teams won their wild card game the opportunity to interview through Friday of the Divisional Round of the playoffs. 167 This amendment was further revised to allow assistant coaches to interview through the playoff weekend, extending the deadline two days. 168 Bear in mind, these amendments apply only to assistant coaches of playoff teams.

Coach Romeo Crennel, a former defensive coordinator of the New England Patriots, represents a worthy example of the need for and benefits of

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(2) "prior to beginning the interview process, clubs should prepare a 'search timeline' that sets forth key decisions and dates leading up to the hiring of a head coach."

(3) "as part of the search process, clubs should make certain that they identify a deep and diverse -- by many different criteria -- pool of head coaching candidates."

(4) "the Committee strongly believes that direct involvement in the interviewing and selection process by a club's principal owner is very important. . . . [Owners are urged] to personally contact candidates and extend invitations to interview for a club's head coaching position."

(5) "requests for permission to interview must be made and documented in accordance with the Anti-Tampering Policy."

(6) "invitations to interview - whether accepted or declined - should be documented directly by the club in a letter to the candidate."

(7) "telephone interviews are never preferable and seldom adequate."

(8) "it is not necessary that the same person interview each applicant."

(9) "candidates who are invited to interview for open positions should do so. Any widespread refusal . . . should promptly be brought to the attention of the [NFL] Commissioner or his senior staff."

(10) In-season head coaching searches are not favored. "However, if a coaching change is made during the season, the club may name an interim coach from its existing coaching staff for the remainder of the season without going through a formal interviewing process. However, the club must follow the mandatory interviewing process in choosing a new permanent head coach."


166. Id. (emphasis added).

167. NAT’L FOOTBALL LEAGUE, supra note 89, at 7 (forbidding employer clubs to contract for a right of first refusal in their favor inconsistent with the Amendment); Press Release, Nat’l Football League, supra note 165. See Pasquarelli, supra note 94.

the Rooney Rule, including the 2002 amendments to the Policy. Prior to their implementation, Coach Crennel was handcuffed by the Policy because of the perennial success of the Patriots.\footnote{Mark Maske, *Teams Eye Patriots' Crennel*, WASH. POST, Jan. 7, 2005, available at http://www.washingtonpost.com/ac2/wp-dyn/A56123-2005Jan7?language=printer.} Each year his club made the playoffs, Coach Crennel was prohibited from interviewing for a head coaching position until the Patriots were eliminated. The Patriots won the Super Bowl for the 2001 season, prohibiting Coach Crennel from interviewing until February 2002. In that year, the Buccaneers, Chargers, Colts, Panthers, Raiders, Redskins, and Vikings all had coaching vacancies that were filled by other coaches.\footnote{2002 NFL Coaching Changes, ESPN.com, Mar. 12, 2002, http://espn.go.com/nfl/s/2002/0312/1350595.html.} Coach Crennel also failed to secure a position after the Patriots won the Super Bowl again during the 2003 season.\footnote{Id.} Although the NFL had already amended the Policy at that time, clubs still did not want to wait until \textit{after} the Super Bowl to hire their new head coach.\footnote{Id.} Not until after the 2004 season did Coach Crennel finally secure a well-deserved head coaching position.\footnote{Id.} Coach Crennel took advantage of the Policy's amendment by interviewing with the Cleveland Browns during the Patriots' postseason bye week. This opportunity would not have been afforded to him prior to the amendment. To be sure, the Browns' patience and willingness to await Coach Crennel's post-Super Bowl availability also secured his ascension.\footnote{The 2006 NFL Head Coach of the Year, Lovie Smith, was also a beneficiary of the Rooney Rule when he was hired in 2004 by the Chicago Bears. David Haugh, *Lovie's in the Air*, CHI. TRIB., Jan. 15, 2004, at 1; Stan Olson, *New Chicago Coach Applauds Hiring Rule*, CHARLOTTE OBSERVER, Feb. 20, 2004, at 3C.}

While an assistant coach still under contract has minimal barriers to discussing a head coaching position once his team’s season is over, he still faces a significant challenge when considering a lateral move. An assistant coach seeking a head coaching position \textit{must} be granted permission to meet with other clubs from the end of his team’s season through February 15 of any year.\footnote{Press Release, Nat'l Football League, \textit{supra} note 165; DiPaola, \textit{supra} note 168. The original rule allowed for assistant coaches to interview through March 1 of any year. However, in March 2004, the owners amended the Policy such that "no interviews [would] be granted for any job from Feb. 15 through the draft." DiPaola, \textit{supra} note 168.} While the club is not required to grant permission after the conclusion of February 15, it has the discretion to do so.\footnote{NAT'L FOOTBALL LEAGUE, \textit{supra} note 89, at 6.}
the head coaching candidates aware of the NFL's anti-tampering prohibitions and furthermore "warn them against making any improper contact with another club's employees, including any contact during the period prior to a candidate's official acceptance of a head coaching position." Conversely, the employer club is not required to grant an assistant coach the opportunity to meet with other clubs if he is seeking only a lateral move (i.e., discussing another assistant coaching position). An assistant coach who continues to work for his employer club, yet whose contract has expired, must be granted permission to meet with other clubs once the club's exclusive rights have terminated, so long as the meeting does not occur between February 15 and the draft. Thus, it is advantageous for an assistant coach to structure his contract such that it expires at the end of the club's season or expressly provides for an appropriate exception to the Policy.

iii. High-Level Club Employees (Non-Player, Non-Coach)

High-level club employees (club presidents, general managers, and persons with equivalent responsibilities and authority) who are under contract have little ability to seek positions with other teams. Even where the employee is being considered for a higher level position by a prospective club, the employer club is not required to grant permission for the two to meet. As in the case with coaches, clubs can negotiate a right of first refusal with the employee. A high-level employee who is not under contract or whose contract has expired, however, has every right to discuss or accept employment elsewhere. It is unclear whether a general manager serving as a team's head coach will be treated as a high-level club employee or head coach under the Policy. Under either circumstance, however, the Policy is equally restrictive. Unless permission to speak to other clubs has been

177. Id. at 8.
178. Id. at 6.
179. Id. at 8. "All assistant coaches in the NFL must be under contract in order to perform coaching duties at training camps and during the rest of the playing season." Id.
180. Id. at 7. If the coach's club is not in the playoffs, the exclusive right extends to "12:01 A.M. on the Tuesday that falls 15 days after the final Monday-night game of the regular season." If the coach's club does make the playoffs, the exclusive right ends "on the third Tuesday after the club's final playoff game, including Super Bowl if applicable, but in no event after the expiration date specified in the coach's contract." Id.
181. Id. at 6; DiPaola, supra note 168.
182. NAT'L FOOTBALL LEAGUE, supra note 89, at 8.
183. Id.
184. Id.
185. Id.
bargained for in the contract, the employer club will dictate whether the
coach/general manager may contact or be contacted by other clubs. 186

Interestingly, in 1996, Green Bay Packers Head Coach Mike Holmgren
was so concerned about another club hiring away his then assistant coach
Andy Reid (currently head coach of the Philadelphia Eagles) that he placed a
“supervisory” tag on Coach Reid, forcing him to be characterized as a high-
level club employee under the Policy. 187 Reid coached the tight ends and
oversaw the offensive line coach. 188 He had no real “supervisory”
responsibilities similar to those of typical high-level club employees. Under
the Policy’s guidelines, Reid was at the mercy of Coach Holmgren and the
Packers if he wanted to pursue another job or if another team wanted to pursue
him. 189 Coach Holmgren’s tag, however, did carry one exception: Reid was
able to interview with another NFL club so long as it was for a head coaching
position, with or without permission. 190 The Packers and Coach Holmgren
clearly used the Policy in their favor, albeit by creating an illusory tag that had
no formidable link to Reid’s true responsibilities on the team.

iv. Other Club Employees (Non-Player, Non-Coach)

Club employees who do not fall within the definitions of player, coach,
or high-level employee face the least amount of restrictions on their movement
within the “non-player” category. Generally, an employer may not
unreasonably deny permission 191 for the employee to discuss 192 and accept
employment with another club, even where the employee is under contract for
the succeeding season or seasons. 193 There are, however, two exceptions to
this rule. First and foremost, if the “employee’s primary responsibilities
extend to recurring events beyond the playing season,” such as those of a
player personnel director whose work is keyed to free agency or the draft,
permission may be denied until after the event has occurred. 194 This exception does not apply if the club employee is being considered for a general manager position with another club. Second, an employer club can deny permission for a prospective club to contact a club employee if the employee is being considered for a position that would be a lateral move. 195 Mindful of these rules, counsel for clubs and club employees must pay attention to titles and duties language in these employment agreements.

Where a club employee is in his final contract year and the regular season has finished, the employer club cannot deny permission for the employee to discuss and accept employment with another team. 196 The lone exception to this rule applies when the club employee’s tasks extend to recurring events in the off-season, akin to those discussed above. 197 Similar to coaches under contract for a succeeding season or seasons, the employee is excluded from this rule if another club is “prepared to offer a general manager’s position, or its equivalent” or the employee’s contract has expired before the recurring off-season event. 198

Clubs desiring to hire League employees must first obtain permission from the “operating head of the League organization.” 199 League organizations include NFL Enterprises, NFL Films, NFL Management Council, and NFL Properties. 200 If the individual works for the League office or is the operating head of a League organization, permission must be acquired from the Commissioner. 201

Once issues involving the advancement of assistant coaches were addressed, the Committee on Workplace Diversity made it clear that it would shift its focus to “career development and diversity in all front office positions, both in football and business operations.” 202 In light of the Committee’s prompt follow through regarding assistant coaches, “other club employees” can reasonably expect beneficial amendments to the Policy in the near future.

D. Discipline

As mentioned previously, it is within the NFL Commissioner’s sole

194. Id.
195. Id.
196. Id.
197. Id.
198. Id.
199. Id. at 10.
200. Id.
201. Id.
discretionary power to issue sanctions against offending clubs within the NFL. The Commissioner can choose from a wide range of sanctions depending on both the perceived intent of the offending teams and the nature of and parties to the tampering. Where a club tampers with a player from another team and fails to prove it was unintentional, the offending club “shall lose its selection choice in the next succeeding [NFL Draft] in the same round in which the affected player was originally selected in the [NFL Draft] in which he was originally chosen.” If the player was undrafted, the Commissioner has the power to choose the round of the selection granted to the offended team. Additionally, if the Commissioner concludes that the offending team acted intentionally, he may issue a fine, half of which can be awarded to the offended team. This fine is limited to $500,000. The Commissioner has similar discretion to remove a club’s draft picks if the tampering involves a college player. Finally, if a club tampers with a coach, the Commissioner has the power to “award or transfer selection choices and/or deprive the offending club of a selection choice or choices.” While the Policy is silent on exactly what type of evidence a club must present to support a successful tampering claim, the Policy’s enforcement history establishes a standard beyond hearsay and circumstantial evidence.

E. The Bottom Line on Tampering

The NFL’s continual examination of the ability of both assistant coaches and “other club employees” to ascend within the NFL portends more changes to the Policy. While far from ideal, the most recent amendments to the Policy have been effective in the hiring of a variety of assistant coaches, most notably coaches Romeo Crennel and Lovie Smith. Player tampering, which appears to be considerably more common and flagrant than non-player tampering, has been modestly sanctioned. In this context, clubs are hesitant to make claims, mainly for fear of being labeled a “rat.” Moreover, the

203. **NAT'L FOOTBALL LEAGUE, supra** note 92, art. VIII, § 8.13(A).
204. *id.* art. IX, § 9.2.
205. *id.*
206. *id.* “[T]he offended club must first certify to the Commissioner that such an offense has been committed.” *id.*
207. *id.* art. VIII, § 8.13(A)(1). Upon the violation of the NFL’s constitution and bylaws of the League, which incorporates the NFL’s anti-tampering policies, the Commissioner may “suspend and/or fine such person in an amount not in excess of five hundred thousand dollars ($500,000).”
relatively high evidentiary burden of any tampering claim, player or non-
player based, is difficult to overcome. Arguably, the Commissioner’s office
has at times exceeded its power in order to advance the goals of the Policy;
where a claim lacks substantial evidence of tampering, however, the offended
team lacks recourse.

V. NFL COACHING CONTRACTS

The legal foundation of an NFL coach’s employment arrangement is his
contract. Thus, in order to understand the market for NFL coaches it is
important to have a basic understanding of these agreements in the current
NFL environment. The sample size for our analysis of NFL coaching
contracts was twenty-three contracts (included in the sample set were contracts
for head coaches, coordinators, assistant coaches and strength coaches). Nineteen of the NFL’s current thirty-two clubs were represented in the sample.
NFL coaching contracts, unlike NFL player contracts, are not standardized and
range in length from twenty-plus page head coaching contracts to cryptic, one-
page letters of appointment. Notwithstanding their lack of uniformity, the
majority of NFL coaching contracts contain a core set of fundamental
provisions with similar, and in a few instances, exact language. The following
analysis provides a review of important contract provisions derived from the
sample set with some specific examples of unique or extraordinary provisions.

A. Confidentiality Provisions

Surprisingly, only two of the NFL coaching contracts reviewed contained
an express prohibition against the disclosure of the contracts’ terms. On the
other hand, many contracts included confidentiality or work product
provisions relating to tangible and proprietary documentation of the club.
Under the terms of such provisions, work product, including scouting reports,
films, photographs, computerized programs, strategies and plays, remains
property of the team upon termination of the coach. The St. Louis Rams’
and Seattle Seahawks’ contracts further provide that the coach agrees to an
injunction to restrain the coach from disclosing such confidential
information.

211. ATLANTA FALCONS FOOTBALL CLUB, INC., EMPLOYMENT AGREEMENT ¶ 18 (Feb. 2, 2004)
(on file with author); KANSAS CITY CHIEFS FOOTBALL CLUB, INC., EMPLOYMENT AGREEMENT:

212. See, e.g., CLEVELAND BROWNS FOOTBALL CO., LLC, ASSISTANT COACH EMPLOYMENT
AGREEMENT ¶ 13 (Feb. 7, 2003) (on file with author); DETROIT LIONS, INC., HEAD COACH
EMPLOYMENT AGREEMENT ¶ 1(f) (Jan. 25, 2001) (on file with author).

213. ST. LOUIS RAMS P’SHP, AGREEMENT ¶ 13 (Dec. 8, 2003) (on file with author). The Seattle
Arguably, the language of most clubs’ confidentiality or work product provisions extends to the dissemination of the coach’s employment terms. Although a court may be challenged to accept such an argument as the detail required to protect against disclosure of other forms of confidential information is particularly specific, mandatory arbitration clauses found in NFL coaching contracts serve to shield their terms from judicial consideration. The fact that a very small percentage of clubs expressly prohibit disclosure of contract terms bodes well for the prospects of NFL clubs and the NFLCA sharing contract information in a legally permissible manner.

B. Constitution, Bylaws, Rules and Regulations

The Constitution and Bylaws of the NFL (NFL Constitution) require that all coaches receive a written employment contract subject to the approval of the Commissioner. Consequently, the Commissioner is a signatory to every NFL coaching contract (as well as to the contracts of NFL administrators and supervisors).

All NFL coaching contracts require a clause wherein the coach agrees to be bound by “the [NFL] Constitution and Bylaws and the Rules and Regulations of the League, as well as by the decisions of the Commissioner, which decisions shall be final, conclusive and unappealable.” This obligation results in every NFL coaching contract containing what amounts to an arbitration format for any dispute, claim or controversy arising from the coach’s employment with the club. The NFL Constitution further requires that the coach waive any claim he may possess against the Commissioner, individually and in his official capacity, the NFL and each of its member clubs, as well as any interest holder in the clubs “for damages and for any other claims or demands arising out of or connected with any decisions of the Commissioner.” The NFL Constitution further requires that every coach’s contract contain an integration clause so that no employment terms or agreements are contained outside of the four corners of the coaching

Seahawks’ contract further provides that the club may recover from the coach $10,000 as liquidated damage for each and every breach of this nondisclosure provision. FOOTBALL NW. LLC, EMPLOYMENT AGREEMENT FOR DEFENSIVE COORDINATOR ¶ 8 (Jan. 12 2000) (on file with author).

214. See FOOTBALL NW. LLC, supra note 213, ¶ 16.
215. See infra Part VII.
216. NAT'L FOOTBALL LEAGUE, supra note 92.
217. Id. art. IX, § 9.3(A)(1).
218. Id. art. IX, § 9.3(A)(2).
219. Id.
As employees of an NFL club, the NFL Constitution prohibits coaches from the following activities and/or conduct:

1. owning a financial interest, directly or indirectly, in another club;
2. loaning money, directly or indirectly, to any player, coach or employee of another club or to another club;
3. loaning money, directly or indirectly, or offering a gift to a game official or NFL employee;
4. acting as agent for an NFL player;
5. publicizing or participating in the selection of any mythical all-League or all-opponent team;
6. offering any gift or reward to a player, coach or individual employed by or affiliated with another club for defeating or attempting to defeat a competing club (offers of gifts to a coach's own players can result in a salary cap charge or violation)\textsuperscript{221};
7. publicly criticizing any member club or its employees and/or any official;
8. directly or indirectly paying a fine for a person who has been penalized;
9. voluntarily failing to present his team for a pre-season or regular season game;
10. tampering with college football players ineligible to play in the NFL;
11. tampering with a player, coach or employee under contract to another member club;
12. offering, agreeing, conspiring or attempting to illegally influence the outcome of a game or failing to immediately discipline any officer, player or employee of the coach's club that attempted to influence the outcome of a game;

\textsuperscript{220} Id.

\textsuperscript{221} In 2003, Kansas City Chiefs Coach Dick Vermeil reportedly offered then Chiefs Kicker Morten Andersen a $500 bottle of wine if Andersen was successful in kicking a thirty-five yard field goal against the Raiders. Anderson made the kick to lift the Chiefs over the Raiders 27-24. Upon learning of the offer, the League office contacted the Chiefs to advise that such offers were prohibited notwithstanding the League did not assess a fine or other disciplinary action against the Chiefs. Associated Press, \textit{NFL to Vermeil: No Wine for Kicker, RENO GAZETTE J.,} Nov. 23, 2003, available at http://www.rgi.com/news/stories/html/2003/11/25/57732.php.
13. taking an interest in any pool or wager of any NFL game; and
14. using at any time impermissible communications or information gathering equipment (i.e., stealing an opponent club’s proprietary information via telephone tapping).222

C. Term and Termination Provisions

With one exception, all contracts reviewed from the sample set were for a duration of three years or less. Although in a few instances—most notably contracts of head coaches—the contracts reviewed and others reported contained future option years beyond year three of the contract, triggered upon the achievement of performance thresholds (e.g., a divisional playoff win or conference championship win in the prior seasons). Not surprisingly, NFL coaching contracts provide for termination under two circumstances: (1) termination at any time for any reason (i.e., without cause) and (2) for cause termination. In at least one contract, there was no distinction between termination for cause or without cause, and although the contract required the coach’s mitigation upon termination, the contract contained no express provision denying base salary or benefits through the end of its term.223

Generally, upon termination without cause, the club is obligated to pay the coach equal installments of his base salary through the term of the contract. In each instance, however, the club is entitled to offset this obligation against any and all income, fees, salary, royalties, etc. – with the exception of investment income – against the amount due the coach.224

Moreover, most coaching contracts also require that the coach meet regular income reporting requirements. In the case of the Arizona Cardinals, for example, coaches are required to provide the club with copies of their federal income tax returns although they are entitled to omit “Schedule A – Itemized Deductions (Form 1040).”225 Some NFL coaching contracts address the situation where the coach voluntarily terminates employment with the club. In each of these circumstances, the coach is required to obtain the club’s prior written consent before accepting any position affiliated with another team competing in the NFL.

Approximately half of the contracts reviewed address termination in the

222. *Id. art. IX, §§ 9.1(B)-(C).*
224. See, e.g., BUFFALO BILLS, INC., ASSISTANT COACH AGREEMENT ¶ 7(e) (Feb. 26, 2004) (on file with author).
context of death or disability. In the case of death, most contracts that address this circumstance provide that the club should pay the coach's designated beneficiary (or the coach's estate if no beneficiary has been designated) the accrued salary owed to the coach through the last day of the month in which the death occurs as well as any vested and accrued benefits from pension and profit sharing plans maintained by the club. In those contracts that address termination for disability, typically the disability must be for a duration of no less than sixty days—most provide for ninety days—and such disability must be determined by the club physician. Although some contracts provide that the club physician's determination of disability will be conducted in a non-discriminatory manner, no contract reviewed provided the coach with a second opinion regarding the determination of disability.

The circumstances giving rise to for cause termination run the gamut. For example, the San Francisco Forty Niners' contract requires that the coach maintain himself in excellent physical condition or he shall be subject to termination.226 On the other end of the spectrum, nearly every contract permits for cause termination upon the conviction of a felony. Interestingly, the Seattle Seahawks' contract provided for cause termination yet did not define "cause."227 Some of the other more common circumstances giving rise to cause in NFL contracts are:

1. Coach's failure or refusal to comply with club policies or standards, or the NFL or its Commissioners' regulations;
2. Fraud, dishonesty or "acts of moral turpitude";
3. Coach's material breach of any covenant, promise, or obligation of the contract;
4. Illegal gambling or betting on professional football (whether legally or illegally);
5. Habitual intoxication;
6. Accepting a bribe or agreeing to throw or fix a game; and
7. Scalping of tickets.228

Some of the more amorphous or unique circumstances giving rise to for

227. See FOOTBALL NW. LLC, supra note 213.
228. See generally CLEVELAND BROWNS FOOTBALL CO., LLC, supra note 212, ¶ 8(b)(i); B&B HOLDINGS, INC., supra note 225, ¶ 7(c)(ii); MIAMI DOLPHINS, LTD., EMPLOYMENT AGREEMENT ¶ 2.4.2 (Jan. 19, 2004) (on file with author); INDIANAPOLIS COLTS, ASSISTANT COACH EMPLOYMENT AGREEMENT ¶ 13 (Mar. 18, 2003) (on file with author).
cause termination include the following:

1. Frequenting places or associating with individuals of questionable character;
2. Any act or thing which tends to bring the coach into public hatred, contempt, scorn or ridicule;
3. Conduct detrimental to the best interest of the club, professional football or the NFL;
4. Insubordination on the part of the coach;
5. Loyalty Clauses; and
6. Violations of any rules and regulations of the PAC-10 Conference and/or the NCAA.

D. Duties/Conduct

The expressed duties or obligations of a NFL assistant coach are frequently defined in basic terms. For example, the "[e]mployee will perform the duties of an [a]ssistant [c]oach as generally understood in professional football." Almost all assistant coaching contracts reviewed further required that in addition to those duties generally understood in professional football, the assistant coach would also undertake any duties designated by the head coach. Many contracts examined contain specific language regarding the services that the coach will provide. These services include training, scouting, counseling, conditioning and evaluating potential talent (draft prospect scouting), as well as coaching a given position. The Oakland Raiders require their assistant coaches to assist not only in the evaluation of football

229. The Houston Texans identified the following conduct as constituting cause for termination: if "[t]he [c]oach makes or publishes any criticism, condemnation, denunciation, or repudiation of the [c]lub or the management, operations or decisions thereof to any persons not employed by the [c]lub that, in the sole discretion of the club, materially impairs the goodwill, business or property of the [c]lub." HOUSTON NFL HOLDINGS, LP, AMENDED AND RESTATED EMPLOYMENT AGREEMENT § 6 (c)(4) (Feb. 1, 2002) (on file with author). Several clubs maintain similar "loyalty" provisions in their coaching contracts.

230. See generally GREEN BAY PACKERS, INC., CONTRACT: ASSISTANT COACH, art. III(d) (Feb. 1, 2005) (on file with author); B&B HOLDINGS, INC., supra note 225, ¶ 5; MIAMI DOLPHINS, LTD., supra note 228, ¶ 2.4.2.

231. MIAMI DOLPHINS, LTD., supra note 228, ¶ 1. See also MINN. VIKINGS FOOTBALL CLUB, LLC, EMPLOYMENT AGREEMENT ¶ 1 (Feb. 1, 2004).


233. See, e.g., OAKLAND RAIDERS, LP, AGREEMENT (Mar. 6, 2003); SAN FRANCISCO FORTY NINERS LTD., supra note 226, ¶ II.
talent but also in soliciting and signing professional football players.\textsuperscript{234}

A small percentage of the contracts reviewed expressly identified collateral services required of the assistant coach. For example, the coach “shall additionally make himself available for, and reasonably participate in, all pre-game or post-game (including next day) interviews and/or question and answer media sessions as may be reasonably required by, or customary in or with, the NFL.”\textsuperscript{235} Interestingly, the St. Louis Rams require their assistant coaches to perform public relations work, including “attending banquets, luncheons and other affairs of civic nature” without payment of any additional compensation.\textsuperscript{236}

Identifying the particulars of a coach’s duties provides some comfort in terms of understanding job responsibilities. However, such definition also carries the risk of exposing the coach to a broader range of activities that give rise to for cause termination, as most coaching contracts expressly provide that failure to satisfy contractual duties constitutes grounds for termination. From the coach’s perspective, then, it may be more beneficial to define duties generically.

Recent NFL Europe contracts include a substance abuse provision that: (1) obligates the coach to submit to voluntary drug, alcohol and/or steroid testing; (2) requires the coach to abide by the NFL Europe League’s Substance Abuse Policies and Procedures which provides penalties for a confirmed positive test; and (3) acknowledges the coach’s agreement that a refusal and/or failure to submit to any drug test in timely fashion is grounds for termination with cause.\textsuperscript{237}

\section*{E. Base Salary}

In 2005, the average assistant coach’s base salary was $268,000 across the NFL.\textsuperscript{238} As of this writing, the estimated 2006 average salary for all NFL assistant coaches is approximately $290,000.\textsuperscript{239} The chart below shows the

\textsuperscript{234} See OAKLAND RAIDERS, supra note 233.

\textsuperscript{235} CLEVELAND BROWNS FOOTBALL CO., LLC, supra note 212, ¶ 4(c)(iii). See also ST. LOUIS RAMS P'SHIP, supra note 213, ¶ 7(D).

\textsuperscript{236} ST. LOUIS RAMS P'SHIP, supra note 213, ¶ 7(D)(i).

\textsuperscript{237} NFL EUR. FLA., INC., INTERN FOOTBALL COACH CONTRACT ¶ 9 (Jan. 17, 2003) (on file with author).

\textsuperscript{238} NAT'L FOOTBALL LEAGUE COACHES ASS'N, supra note 38.

\textsuperscript{239} Telephone Interview with Larry Kennan, Executive Dir., NFLA, in Washington, D.C. (July 25, 2006). Mr. Kennan’s estimate considers two factors: (1) salaries currently reported (as provided in the chart as of December 1, 2006); and (2) salaries that will be reported following the completion of the 2006 NFL season. Logically, the greater the number of salaries actually reported, the more accurate will be the estimated average salary of all NFL assistant coaches (reported and not reported).
dramatic rise in NFL coaching salaries during the last five years (2006 numbers will not be finalized until early in 2007). However, these numbers in the last two years may not accurately reflect the actual increase in average salaries because many coaches failed to participate (the trend of decreased salary reporting from year to year is yet another factor weighing in favor of permissible information sharing discussed in Section VII). In any event, at a minimum, they show a trend of increasing salaries.

<table>
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<th>Year</th>
<th>Offensive Coordinators</th>
<th>Avg. Salary</th>
<th>Defensive Coordinators</th>
<th>Avg. Salary</th>
<th>All Assistant Coaches and Coordinators</th>
<th>Avg. Salary</th>
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</table>

The NFLCA does not conduct annual surveys of head coaches’ salaries. Nevertheless, the salaries of NFL head coaches are widely reported. In 2002, recently hired Washington Redskins head coach Steve Spurrier’s $5 million per year annual salary inched the average annual salary for NFL head coaches to just shy of $3 million.\(^\text{242}\) Although 2006 will bring many first year NFL head coaches to the sidelines,\(^\text{243}\) lucrative contract extensions for veteran NFL head coaches – Mike Holmgren ($7 million per year average),\(^\text{244}\) and John Fox ($5 million per year average)\(^\text{245}\) – have likely spiraled the average NFL head

\(^{240}\) Larry Kennan also says that coordinator salaries tend to be higher for defense than offense because several head coaches run their offenses. \(\text{Id.}\)

\(^{241}\) Nat'l Football League Coaches Ass'n, Preliminary Salary Survey (2006) (salary information reported to the NFLCA as of December 1, 2006).


\(^{243}\) In 2006, the following coaches are first year NFL head coaches: Packers head coach Mike McCarthy, Lions head coach Rod Marinelli, Saints head coach Sean Payton, Jets head coach Eric Mangini, Vikings head coach Brad Childress, and Texans head coach Gary Kubiak.


\(^{245}\) Matthew Borghese, Carolina Panthers Give Coach Fox 5-Year Contract, All Headline
coach salary beyond $3 million per year.

There is no longer an off-season for NFL coaches. Accordingly, their salaries are paid throughout the year, typically in semi-monthly installments.

F. Bonuses

Unlike their head coaching brethren, assistant coaches enjoy surprisingly few bonuses. In those circumstances where bonuses are provided, the assistant coach typically receives an amount equivalent to a player’s share of post-season bonuses. In 2006, on a per-game basis, post-season bonuses ranged from $17,000 (for a non-division winner participating in a Wild Card game) to $73,000 for players on the winning Super Bowl team. For those assistant coaches with playoff bonuses, a total of $148,000 was available in the aggregate, assuming the coach’s club won the Super Bowl. Some clubs, such as the Atlanta Falcons, add $5000 to the player’s share amount throughout the post-season. Many clubs leave the amount of the playoff bonus to the discretion of the club and do not tie such sum to the NFL player’s share.

Bonuses for head coaches are most frequently tied to performance. Financial incentives include incremental and cumulative payments based on: (i) earning a playoff bid; (ii) earning home field advantage through the playoffs; (iii) winning the Conference Championship Game; (iv) participating in the Super Bowl; and (v) winning the Super Bowl. Head coaches may also receive monetary bonuses for being named Coach of the Year by the Sporting News, Associated Press, United Press International or Pro Football News, Mar. 27, 2006, http://www.allheadlinenews.com/articles/7002944970.

246. See, e.g., MIAMI DOLPHINS, LTD., supra note 228, ¶ 4.8. Per the Minnesota Vikings’ contract, “If in the event of any post-season play by the Club, post-season pay will be equivalent to a player’s share as defined in Article XLII, Section 2 of the NFL Collective Bargaining Agreement.” MINN. VIKINGS FOOTBALL CLUB, LLC, supra note 231. The New York Giants’ assistant coaching contracts contain similar language:

| Conversely, the assistant coach is entitled to receive a payment or payments by virtue of the Club's participation in such game or games, then the Assistant Coach shall be entitled to receive a payment or payments determined by the same mechanism and paid under the same terms as the payments received by the Club's players under the most recently executed collective bargaining agreement between the National Football League Player's Association and the National Football League Management Council. |

N.Y. FOOTBALL GIANTS, supra note 223.

247. NAT'L FOOTBALL LEAGUE, supra note 7, art. XLII, § 2.

248. Id.

249. ATLANTA FALCONS FOOTBALL CLUB, LLC, supra note 211, ¶ 3(b).

250. See, e.g., DETROIT LIONS, INC., supra note 212, ¶ 3(e).
G. Coaches’ Healthcare and Benefits

Today’s NFL coaches operate in an intensely stressful environment. Not surprisingly, this intense level of stress can, and frequently does, cause or exacerbate health problems. NFLCA Director Larry Kennan estimates that today’s NFL coaches work ninety to one hundred hours a week, seven days a week, for twenty-six straight weeks.252 “You can’t do that for 15 straight years and not let it affect your health.”253 Last year, the reported instances of coaches’ health problems included St. Louis Rams Head Coach Mike Martz (fifty-four at the time), who took an indefinite leave of absence believed to be caused by endocarditis, Green Bay Packer Offensive Coordinator Tom Rossley (fifty-nine at the time), who was hospitalized just before a game between the Packers and the Tampa Bay Buccaneers after experiencing pains in his chest, left arm and side (Rossley had bypass surgery in 2004),254 Jacksonville Jaguars Offensive Line Coach Paul Boudreau (fifty-five at the time), who collapsed in the locker room after his club’s season-opening victory against the Seattle Seahawks, and Seahawks Defensive Coordinator Ray Rhodes (fifty-four at the time), who suffered a mild stroke.255

Currently, only half of the NFL teams provide health insurance to coaches at no cost. Therefore, nearly half of the NFL’s coaches pay for their own medical health insurance. The NFL maintains a Flex Benefit Plan for this purpose. For those coaches not fortunate enough to receive paid healthcare coverage, they can expect insurance premiums to reflect their health history in an increasingly stressful environment.256

Few coaching contracts expressly provide for health and disability insurance. And, of the contracts reviewed, even fewer incorporate by reference an employee handbook or policy manual that may contain the terms of such benefits. The Houston Texans, however, offer an array of fringe benefits to assistant coaches that include the coach’s right to participate in the

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251. Id.
252. Jarrett Bell, Coaches Often Lack Game Plan for Own Health, USA TODAY, Oct. 12, 2005, at 3C.
253. Id.
254. Id. Rossley signed himself out of the hospital that day to return to the game in the second quarter after hospital tests indicated that he was not suffering a heart attack.
255. Id. Rhodes returned to the Seahawks after a brief medical leave of two weeks. See Telephone Interview with Larry Kennan, supra note 239.
NFL's pension plan or any club-sponsored 401(k) savings plan, the coach's and his family's entitlement to health and welfare benefit plans maintained by the club, life insurance and disability insurance as maintained by the club, tickets to each of the club's football games (as determined in accordance with the club's ticket policy), the use of an automobile at no cost to the coach (other than non-reimbursable gas and maintenance expenses) and paid vacation in accordance with the club's policy. Express provisions granting the reimbursement of reasonable business and travel expenses were scarce among the contracts reviewed.

A detailed analysis of NFL coaches' retirement plans is provided in Part VI.

H. Perquisites

i. Assistant Coaches

Few assistant coaching contracts expressly provide the coach with the use of an automobile. This is a departure from most major college programs, which provide their staffs with a dealer courtesy car through long established dealer programs. This may be a result of history. In the past, college coaches were expected to travel the country scouting players, while NFL coaches had players coming to them. Surprisingly, few assistant coaching contracts reviewed expressly provide for game tickets—home or away—let alone Super Bowl tickets.

ii. Head Coaches

The perquisites available to an NFL head coach may be limited only by his modesty and tax accountant. Typical examples include Super Bowl tickets, automobile allowances, V.I.P. parking passes and relocation

257. HOUSTON NFL HOLDINGS, LP, supra note 229, ¶ 5.
258. But, cf. BUFFALO BILLS, INC., supra note 224; CLEVELAND BROWNS FOOTBALL CO., LLC, supra note 208.
259. The Green Bay Packers provides its assistant coaches with "the use of one late model, high quality automobile of the Packers' choice" or the cost and expenses in connection with the coach's lease of such vehicle, as well as insurance. GREEN BAY PACKERS, INC., supra note 230, art. I(d). Notably, an express automobile provision is absent in the Packers' Director of Player Development/Offensive Assistant contract. GREEN BAY PACKERS, INC., DIR. OF PLAYER DEVELOPMENT/OFFENSIVE ASSISTANT (Feb. 14, 2005) (on file with author).
260. The Cleveland Browns' assistant coaches, however, enjoy the right to four complimentary home game tickets and the opportunity to purchase four away game tickets as well as two Super Bowl tickets. CLEVELAND BROWNS FOOTBALL CO., LLC, supra note 212, ¶ 5(d).
expenses. More exotic examples include sky boxes, catered and furnished in the coach's discretion, first class family travel, and privileges at elite country clubs.

I. Right of Publicity Provisions

Nearly every NFL coaching contract reviewed contained a provision that, at a minimum, assigns a nonexclusive right to the club for the duration of the coach's employment (and sometimes thereafter) to use the coach's name, portrait, picture, likeness, voice, etc. captured in games, practices or interviews in conjunction with any promotional, advertising, marketing or trade purpose that the club desires. With the exception of a head coach's participation in television and radio shows, NFL coaches must receive the prior written consent of the club before participating in any activities that generate collateral income. Moreover, in the contracts that contained right of publicity provisions, nearly every such contract expressly provides that the coach "shall not use the club's logos, trademarks, name or any other protected right without the express written consent of the club or when required, the National Football League." Although an NFL head coach maintains enough leverage to routinely secure consent from his club to identify himself as the club's head coach, rarely will even a head coach be permitted to use

261. See DETROIT LIONS, INC., supra note 212, ¶ 3(d), (f).

262. Id. ¶ 7.

263. The right of publicity is the right of every human being to control the unauthorized use of his or her name, likeness or other index of personal identity for purposes of trade. BLACK'S LAW DICTIONARY 1350 (8th ed. 2004).

264. The Indianapolis Colts retain the nonexclusive right to the coach's right of publicity in perpetuity. INDIANAPOLIS COLTS, supra note 228, ¶ 9(b).

265. A typical right of publicity provision contains language such as the following: "[W]ithout the Club's prior written consent, [the coach is prohibited from] licens[ing] to any third party the right to use his name, likeness, photograph, voice, signature facsimile or biographical information, for any commercial or promotional purposes whatsoever." HOUSTON NFL HOLDINGS, LP, supra note 224, § 4(c).

266. See, e.g., GREEN BAY PACKERS, INC., supra note 230, art. V. The Atlanta Falcons further require that the coach not participate in any commercial or promotional ventures that are based on or designed to profit from the coach's relationship with the Atlanta Falcons or the Falcons' membership in the NFL without the Falcons' prior written approval. ATLANTA FALCONS FOOTBALL CLUB, LLC., supra note 211, ¶ 6(b).

267. For instance, Bill Cowher, the coach of the 2006 Super Bowl Champion Pittsburgh Steelers, is participating in three national television advertising campaigns leading into the 2006–07 season and is pictured on the cover of EA Sports' NFL Head Coach video game. Terry Lefton, Season After Super Bowl Victory, Cowher Showing Higher Profile in Advertisements, STREET & SMITH'S SPORTS BUS. J., July 17, 2006, at 5. Notably, all advertisements Cowher is participating in are for current sponsors of the NFL. Id.
the NFL’s trademarks in conjunction with endorsements, appearances or advertisements.\textsuperscript{268} Such consent would need to come from NFL Properties, Inc.\textsuperscript{269}; it is not within the club’s power to grant such license. This is also true for players and team owners.

\textbf{J. NFL Properties, Inc. Provision}

In recent years, the NFL has secured lucrative licenses from corporate America for on-field apparel and in-stadium advertising.\textsuperscript{270} In recognition of such agreements and in an effort to protect its sponsors, the NFL requires that every coaching contract contain the following language, typically identified in a contract paragraph entitled “Game Day Promotions,” “Sideline Apparel” or some similar heading:

\begin{quote}
Game Day Commercial Licensing Programs.

Employee acknowledges that Employer, through NFL Properties, Inc., is participating in one or more game day commercial licensing programs. Therefore, Employee agrees that he will not accept any consideration from third parties for and will not wear, display or promote any apparel or other product bearing commercial names or logos of manufacturers throughout the game day period while Employee is in view of the stadium and television audience, including any pre-game warm-ups, in the bench area, and during post-game
\end{quote}

\begin{footnotes}
\item[268] For example, even the Dallas Cowboys’ storied head coach Bill Parcells’s television advertisements for his instructional videos (Backyard Drills) that routinely air on the NFL network are bereft of any reference to the National Football League or its trademarks. Coach Parcells does, however, identify himself as the "head coach of the Dallas Cowboys" in such advertisements. \textit{Bill Parcells’ Backyard Drills Commercial} (2005).
\item[270] Over the past decade, NFL Properties has pared down its licensed merchandisers to better manage its fan base and products. \textit{NFL Brand Game Plan: Team Effort—National Football League Reorganizes its Apparel Licensing Program}, DSN RETAILING TODAY, Sept. 17, 2001, available at http://www.findarticles.com/p/articles/mi_m0FNp/is_16_40/ai_78544571. The NFL has signed long-term deals with companies such as Reebok, VF Imagewear and G-III for merchandising of sideline apparel and footwear for all thirty-two NFL teams. \textit{Id.} Under the terms of the license agreements, a licensee of the NFL trademarks must pay nine to eleven percent royalties to NFL Properties and guarantee a minimum payment to NFL Properties, even if the product is unsuccessful. Michael Barrier, \textit{Getting a Product into the End Zone – How to Get Products Licensed by the National Football League or the National Collegiate Athletic Association}, NATION’S BUS., Feb. 1997, available at http://www.findarticles.com/p/articles/mi_m1154/is_n2_v85/ai_19084114. Further, it must receive approval of product samples prior to production and create the product in thirty-two versions to represent all NFL teams. \textit{Id.}
\end{footnotes}
interviews in the locker room or on the field. However, Employee understands that pursuant to such NFL Properties licensing programs, Employee is expected to wear merchandise on game day on the sidelines as provided by official NFL suppliers and as directed by NFL Properties, and Employee agrees to do so.271

K. Control Provisions

As coach Bill Parcells said, “If they want you to cook the dinner, at least they ought to let you shop for some of the groceries.”272

Understandably, control provisions are a key component in head coaching contracts. Many head coaches not only prefer, but require, the sole and exclusive right to select, hire and terminate assistant coaches, coordinators and strength coaches. Many head coaches also require final decision making authority on trades, draft selections, roster cuts and the final roster composition.273 The Detroit Lions’ head coaching contract requires the approval of club president Matt Millen on all such player decisions.274

Assistant coaching contracts rarely provide for a coach’s right to control club operations. In fact, the Oakland Raiders’ contract prohibits an assistant coach from hiring and firing personnel (presumably this prohibition applies to uniformed and non-uniformed personnel).275

L. Unique Provisions

i. Assignments

In what amounts to a trade clause, the Cleveland Browns have included an assignment provision in its contract permitting the club to assign its rights or obligations, without restriction, to any entity in which the club has an equity interest.276 Such provision may be particularly useful to the clubs that also own an Arena Football League team.277 From the coach’s perspective, such

271. BUFFALO BILLS, INC., supra note 224, ¶ 8.
273. DETROIT LIONS, INC., supra note 212, ¶ 1(a)(ii).
274. Id. ¶ 1(a)(v).
275. See OAKLAND RAIDERS, LP, supra note 233.
276. CLEVELAND BROWNS FOOTBALL CO., LLC, supra note 212, ¶ 7.
277. The Dallas Cowboys, Atlanta Falcons and Denver Broncos are owners of Arena Football League clubs.
an assignment is akin to a reassignment clause frequently seen in college coaching contracts. In essence, it provides the parent club with the opportunity to continue to receive value for a coach when a termination for cause is not available. And, in practice, these assignment clauses may serve to dramatically reduce the value of the remaining guaranteed portion of the existing contract if a coach reasonably believes that such an assignment (e.g., to an Arena Football League club) represents a career-limiting proposition. In that circumstance, the coach may negotiate for less than the outstanding balance of his contract in an effort to purchase his contractual freedom. One Arizona Cardinals’ contract included an assignment provision that was limited to the “successor entity” of the club. From both the club and coach’s perspective, such an assignment is reasonable.

ii. Agreement Not to Solicit

Some assistant coaching contracts require the assistant coach to agree not to solicit, negotiate or hire any current employee of the club without the permission of the head coach or the President/General Manager in the event the assistant coach later becomes an NFL head coach. The value of this provision to the club may currently be less significant because of the Policy. However, if the NFL continues to relax the Policy, the value of such a provision to the club increases.

iii. Work Stoppage

A few of the contracts reviewed provided a force majeure clause drafted broadly enough to arguably permit tolling or termination of the employment contract in the event that a strike or labor dispute results in a work stoppage. Only the New York Jets’ coaching contract, however, expressly identified all forms of work stoppage as grounds for suspending and eventually terminating the employment arrangement.

iv. Lame Duck Clauses/Exceptions to the Anti-Tampering Rules

No assistant coaching contract reviewed addressed the situation where the head coach was terminated prior to the end the season. Most assistant

279. See B&B HOLDINGS, INC., supra note 225, ¶ 16.
280. See, e.g., KANSAS CITY CHIEFS FOOTBALL CLUB, INC., supra note 210, ¶ 13.
281. N.Y. JETS, LLC, supra note 232.
coaches in this circumstance recognize that their best prospects for coaching in the NFL the following season likely lie elsewhere. Coaches in this situation desire the freedom to explore other opportunities. In contrast, most clubs in this situation desire to retain the staff at least as long as it takes to hire a new head coach. Clubs frequently desire their assistants' continued employment so that the new head coach may consider retaining certain assistants for any number of reasons, including the staff's institutional and player knowledge.\footnote{282}

In order to avoid the potentially detrimental consequences of a "supervisory tag," or to increase future employment opportunities, or both, coaches and clubs should also consider the benefit of express exceptions to the NFL's Anti-Tampering rules. These carve-outs can range from a club's right of first refusal to an agreement that a supervisory tag may only be applied in the event a certain threshold level of salary is provided.

v. Buy Outs

No NFL coaching contract reviewed contained a buy out clause. Such provisions have become rather common within the realm of college coaching. The likely reason for the lack of buy out clauses is that NFL coaching contracts are essentially guaranteed, absent, of course, grounds for a termination with cause. Yet, the somewhat onerous mitigation provisions contained in NFL coaching contracts and the relative frequency of disputes arising therefrom\footnote{283} suggest that a well-considered buy out clause could make sense. At a minimum, buyouts give both parties financial certainty in the event of termination and remove the potential for animosity that frequently accompanies arbitration.

\textit{M. The Future of Liquidated Damages Provisions and Offsets for Post-Termination Income}

The 2006 discharge of Mike Heimerdinger as offensive coordinator by the New York Jets—after a protracted and public standoff over whether he was to be retained, possibly against his own desires—after unsuccessfully interviewing to become the team's head coach, is illustrative of the potential conflicts that can arise as coaches change places before the expiration of their contracts. \footnote{284} As coaching salaries continue to escalate, clubs may take an
increasingly active role in seeking to enforce offset provisions for additional income earned after a coach is terminated but before his contract expires or they may seek to have discharged coaches ask to have their contracts rescinded. Cases have historically imposed the duty to mitigate damages, and offsetting income earned after the termination of a contract is a form of mitigation. The concept of double-dipping, or the acceleration of contractual benefits, is one that is increasingly more common as representatives recognizing that coaching is a very insecure business want to insulate their clients financially against a firing that is seemingly inevitable. Most NFL contracts impose offset clauses that apply to all income. Such provisions do not seem to be broadly enforced outside the NFL, although the trend may be toward broader enforcement. Since assistant coaches seldom have buyout provisions and their tenure is tied to that of the head coach, such provisions may not be applicable in the NFL unless specifically negotiated. The presence of such clauses in collegiate football coaching contracts and the possibility of double-dipping after termination may make collegiate coaching a more financially rewarding option.

Every year there are several arbitrations between NFL clubs and NFL coaches concerning the offset provision in coaches’ contracts. The two most common arguments made by NFL clubs in these proceedings are that: (1) the coach failed to undertake the level of effort required by his contract to find substitute employment (i.e., reasonable or best efforts) and (2) the amount of salary the coach is currently receiving from his new employer is below market, resulting in a larger contribution from the former club. Frequently, these disputes are initiated by the coach in response to his former club stopping installment payments due under the contract. Faced with no, or dramatically reduced, income and the uncertainty of the Commissioner-appointed arbitrator’s decision, many coaches simply choose to settle claims for a fraction of their value. One of the principal benefits provided by the

"incredulous" and expressing the hope "we can get beyond this." *Id.* The stumbling blocked apparently was the two years remaining on Heimerdinger's contract and what the Jets' liability would be if he did not obtain equal compensation.


289. Interview with Larry Kennan, *supra* note 278.

290. *Id*.

291. *Id*.
NFLCA to its members is the assistance of counsel, without charge, in these offset arbitrations.

These arbitrations also invite an examination of the dearth of information in the NFL coaching market. Should a club claim that its former coach negotiated a contract below market value with another NFL club, the issue of determining “market value” becomes paramount. Because detailed contractual information is necessary to prove such a claim, some clubs may undertake the arbitration as a subterfuge for obtaining valuable market information (e.g., contract terms between other NFL coaches and their clubs) not otherwise at their disposal. Similarly, from the coaches’ perspective, although their yearly salary surveys constitute more information than the clubs currently enjoy, they are bereft of much of the detail necessary to make or defend a claim focused on market value of a given position with a given club. This circumstance is another compelling reason for NFL clubs and NFL coaches to find permissible means to a more intelligent market place.

VI. NFL PENSION PLAN

Notwithstanding that very few NFL contracts expressly provide for pension benefits, every NFL coach that meets minimal eligibility requirements is entitled to participate in the National Football League Club Employees Pension Plan (“Plan”). In addition to Plan benefits, some clubs may also offer a 401(k) savings plan\(^{292}\) or similar retirement benefits. The availability of these additional retirement benefits should be confirmed or negotiated on a case by case basis. However, since every NFL coach maintains at least the opportunity to qualify for Plan benefits and because Plan benefits are somewhat unique and relatively generous, they are worthy of further consideration.

A. Background

The Plan provides income to both “coaches and front office employees of member clubs”\(^{293}\) upon their retirement. The NFL operates a defined benefit plan, where the pension benefit is “determined in accordance with a formula

\(^{292}\) A 401(k) plan refers to the Internal Revenue Code section after which such plans are named. In 2006, a coach can contribute $15,000 of his 2006 salary to a 401(k) plan on a pre-tax, tax deferred basis. I.R.C. § 401(k) (2006).

\(^{293}\) Nat’l Football League, National Football League Club Employees Pension Plan 1 (1989) (emphasis added) (on file with author). The plan applies to those "employed by a Member Club of the League other than as a football player." Id. at 4. Employees "remain . . . active participant[s] in the Plan until [they] stop[] working for a Member Club of the League." Id. Those who leave the league will become active participants if they choose to re-join. Id.
set out in the Plan." Under a defined benefit plan, the benefits are slow to accrue early in the employee's career; however, they accelerate mid-career. Member clubs, not individual participants, make contributions to the Plan. Moreover, the clubs are responsible for directing the investments within the Plan. Thus, unlike a defined contribution plan, the clubs bear the risk of their investments, and the employees are guaranteed a defined monthly payment upon their retirement. In addition, a portion or all of the retirement income can pass to "designated beneficiaries" upon the death of the retiree.

B. Payment Factors

The benefit payment(s) for the Plan are calculated based on three factors: a coach's (1) compensation, (2) credited service, and (3) age at retirement. The higher a coach's compensation and years of credited service, the larger his accrued benefit will be.

i. Compensation

Compensation is measured via three different calculations for purposes of determining benefits: (1) calendar year compensation, (2) covered compensation, and (3) final average compensation. Each of the foregoing compensation components is inserted into a formula to determine a coach's annual plan benefits. The amount of compensation considered in the formula is limited by the federal government; currently, the cap is

294. Id. at 1.
295. Id. ("The amount that the Member Clubs contribute to the Plan is determined periodically by an actuary.").
296. Id. at General Information.
297. Id. at 27.
298. Id. at 20.
299. "Credited service is your total number of Plan Years of employment with the Member Clubs of the League in which [a member is] credited with at least 1,000 Hours of Service." Id. at 5.
300. Id.
301. A coach's calendar year compensation includes the "total wages or salary as reported on Internal Revenue Service ("IRS") Form W-2, plus tax-deferred contributions to a salary reduction, or '401(k)', savings plan and any elective contributions under a cafeteria plan." Id.
302. Covered compensation, which is determined by IRS regulations, is the "average of the Social Security taxable wage bases during the 35 years prior to [a coach's] 'social security retirement age,' which is age 65, 66, or 67, depending upon the year of [his] birth." Id.
303. Final average compensation is a coach's highest average yearly compensation over a span of five consecutive calendar years during credited service, no matter when those consecutive years take place. Id. at 5-6.
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$220,000,304 but it is adjusted annually.

ii. Credited Service

A coach’s credited service comprises the “total number of Plan Years of employment with the Member Clubs of the League in which [he is] credited with at least 1,000 Hours of Service.” A plan year runs from April 1 through March 31. An hour of service is defined under the Plan as an hour for which an employee is to be compensated “or entitled to be compensated as an active employee.” This includes not only hours of actual work for a Member Club, but also hours for which [a coach is] entitled to be paid even though [he is] not at work.

C. Vesting

Under the League’s Plan, a coach is not eligible to receive retirement benefits until he has completed at least three years of vesting service, at which point the Plan starts to vest. Vesting service is equivalent to a year of credited service. At the end of three years of vesting service, sixty percent of an employee’s benefits have vested meaning the coach is entitled to sixty percent of his retirement benefits. This rises to eighty percent after four years. The plan fully vests at the end of five years of employment. A coach can also become fully vested if he reaches normal retirement age while being currently employed by a member club. Thus, after five years of vesting service, a coach will be entitled to one hundred percent of his retirement benefits. This is particularly important for coaches who do not finish their careers with the NFL. Under the Plan, a member coach never loses years of vested service. Thus, if a member leaves the Plan prior to having three years of vested service, but later returns, the previous years of vested service will be credited.

304. I.R.C. § 415(d).
305. NAT’L FOOTBALL LEAGUE, supra note 293, at 5.
306. Id. at 3.
307. Id. at 6.
308. Id. This includes "a maximum of 501 hours for any single contiguous period during which you perform no duties for a Member Club." Id. An employee can also receive credit hours for "certain military service and back-pay awards." Id.
309. Id. at 8.
310. Id.
311. Id.
312. Id.
313. Id.
314. Id. at 15.
service will be restored to his total.

\[ D. \quad \text{The Formulas} \]

i. Normal Retirement Benefit

Coaches are eligible for "normal retirement benefits" if they retire after the age of sixty-five.\textsuperscript{315} Such benefits are paid in monthly installments under the Plan.\textsuperscript{316} The Plan provides a somewhat lengthy formula for determining a coach's annual benefit.\textsuperscript{317} Two figures, final average compensation and years of credited service, primarily influence this calculation. The greater a coach's final average compensation and years of credited service, the larger his annual benefit will be under the Plan. However, the Internal Revenue Code mandates that a coach's final average compensation be capped at $220,000 for purpose of determining benefits under the Plan.\textsuperscript{318} Thus, if a coach has a final average compensation of $300,000, $220,000 will be entered into the formula.

A quick example sets forth the impact of the pension cap. Assume current Seahawks head coach Mike Holmgren retires with a final average compensation of $5,000,000\textsuperscript{319} — an amount far surpassing the $220,000 final

\begin{itemize}
  \item [Coach’s] Prior Plan Benefit, if any; plus
  \item A benefit equal to the greater of
    \begin{itemize}
      \item (A) The sum of
        \begin{itemize}
          \item (1) 3.5% of [the coach’s] Final Average Compensation, multiplied by the lesser of (a) his years of Credited Service completed after March 31, 1989, or (b) 15; and
          \item (2) 0.5% of [the coach’s] Final Average Compensation in excess of Covered Compensation, multiplied by the lesser of
            \begin{itemize}
              \item a. his years of Credited Service completed after March 31, 1989, or
              \item b. The lesser of
                \begin{itemize}
                  \item i. 35 minus [his] years of Credited Service completed prior to April 1, 1989, or
                  \item ii. 15;
                \end{itemize}
            \end{itemize}
        \end{itemize}
    \end{itemize}
    \item (B) 5.0% of [the coach’s] compensation (excluding compensation exceeding $30,000) for the calendar year ending within each of [his] years of Credited Service beginning after March 31, 1989.
\end{itemize}

\textsuperscript{315} The full age of retirement can always be adjusted going forward. \textit{id}.
\textsuperscript{316} \textit{id}.
\textsuperscript{317} \textit{id}. at 9.
\textsuperscript{318} I.R.C. § 415(d) (2006).
\textsuperscript{319} Coach Holmgren recently extended his contract with the Seattle Seahawks. The two-year extension to his contract resulted in an average of over seven million dollars per year for the next
average compensation cap. For purposes of this example, further assume that Coach Holmgren retires in 2007 at normal retirement age with over fifteen years of credited service. Finally, assume he has no prior benefit plan. Since his final average compensation is capped, he will only receive an annual benefit of $128,156. Furthermore, even without the final average compensation cap, Coach Holmgren would still be limited in his annual benefit under the Plan. The Internal Revenue Code currently limits the annual payment under a defined benefit plan to $200,000.

Recognizing that many of its coaches would be limited by the final average compensation cap, the NFL provides additional retirement benefits to its coaches via a Supplemental Employee Retirement Plan (SERP). The SERP allows coaches to collect annual retirement payments in addition to those generated from the Plan. The gross benefit payable from the SERP is calculated by using the Plan’s formula.

Pursuant to the SERP formula, however, Coach Holmgren’s final average compensation is capped at $315,000 instead of $220,000. Thus, assuming all of the same variables from the above example, Coach Holmgren’s gross benefit payable under the SERP would be $185,156. The Plan and the SERP are coordinated so that the net benefit payable from the SERP is equal to the gross benefit, $185,156, less the benefit payable from the pension plan, $128,156. This equals $57,000, the added benefit of the SERP. Thus, in our example, Coach Holmgren will receive an annual benefit of $185,156 — $128,156 payable from the Plan and $57,000 payable from the SERP.

While the retirement benefits of every post-2000 NFL head coach and many coordinators are likely to be limited by the compensation caps of both the Plan and the SERP, some assistant coaches may not tap into the SERP at all. An example sheds light on this possibility. Coach X, a tight ends coach for the Atlanta Falcons, has a final average compensation of $150,000. He
retires in 2007 at normal retirement age with over fifteen years of credited service. He has no prior benefit plan. Coach X is under the $220,000 maximum average compensation allowable under the Internal Revenue Code. His benefits under the plan will amount to $86,155.95. Since Coach X's final average compensation is below the $220,000 maximum, he will not tap into any of the SERP's benefits.

Although the SERP provides added benefits on top of the Plan, they are minimal in comparison to a SERP with no maximum average compensation. Given the rapid rise in coaching salaries, it is inevitable that without a modification to the existing retirement plans, more and more coaches' retirement benefits will eventually be capped as per the Coach Holmgren example provided above.

ii. Early Retirement Benefits

Coaches also have the option of receiving early retirement benefits at a reduced rate once they have reached the age of fifty-five and have accrued five years of credited service. These reduced monthly payments remain constant after a coach's normal retirement date or following the date of termination. Under the latter scenario, the annual benefit will be a percentage of the normal retirement benefit (discussed above) determined by an Early Commencement Table offered under the Plan. Benefits are reduced for coaches receiving earlier payments because they are expected to receive more years of benefits than those receiving them at the normal retirement age.

For example, assume Coach Z, a strength and conditioning coach for a member team, retires in 2007 at age fifty-seven, eight years ahead of his normal retirement date. He has served fifteen years in the League and has an accrued benefit of $82,000. Coach Z wants to begin receiving his payments after he is terminated. His retirement date would be ninety-six months earlier than his normal retirement date. Referring to the Early Commencement Table, the applicable percentage used to discount his accrued benefit is .567. Coach Z's early retirement benefit equals $46,412 ($82,000 * .567).

325. This number was calculated using the Plan's formula. The variables included final average compensation ($150,000), years of credited service (15) and covered compensation ($52,254).
326. NAT'L FOOTBALL LEAGUE, supra note 293, at 11.
327. Id.
328. Id. This table is attached. See infra Exhibit 1.
COACHING IN THE NFL

iii. Other Types of Benefits

The Plan also offers postponed retirement benefits, disability retirement benefits, deferred vested benefits and death benefits. Coaches who exercise the postponed retirement benefits work past the age of sixty-five. These coaches choose not to receive their benefits until after they reach the normal retirement age or reach the age of seventy and a half. At the age of seventy and a half, the federal government requires all retirees to receive a minimum required payment. If coaches are "totally and permanently disabled," they can opt for one of two types of disability retirement benefits. They can receive a monthly benefit, equal to one-twelfth of their accrued benefit, which is not actuarially adjusted or reduced. Coaches can also opt for a lump sum that is actuarially equivalent to their accrued benefit, scheduled to commence on their normal retirement date. Coaches who are not eligible for normal or early retirement benefits, but who have completed three or more years of vesting service, can receive a deferred vested benefit. This benefit consists of "the vested portion of the pension benefit" coaches have earned as of their termination date. For coaches who have completed at least five years of credited service, benefits may be received as early as their fifty-fifth birthday. These payments will be adjusted based on the Early Commencement Table. Finally, if a coach dies after attaining the age of fifty-five and five years of credited service, his beneficiary "will receive a

330. Id.
331. Id. For coaches who are still working for a club after the age of seventy and a half and have begun to receive payments, their benefits, which accrue each plan year, "will be reduced by the actuarial equivalent of the total benefit distributions made to [them]." Id. at 12.
334. Id.
335. Id. This is similar to the adjustment made to the early retirement benefits, which are calculated using the Early Commencement Table. If this option is chosen, the benefit will be retroactive to the date of [the employee’s] disability and will be payable for life; provided that if [the employee has] not yet attained [his] Normal Retirement Age, the benefit will be payable only until [his] disability ceases and only for the period of time that [he] is eligible to receive disability benefits under the Social Security Act.
336. This group includes employees who retire before the age of fifty-five but have accrued three or more years of vesting service.
337. Id. at 13.
338. Id. These payments would begin "on the first day of any month coincident with or next following [an employee’s] 55th birthday." Id.
339. Id.
single lump sum equal to the value of the participant’s earned benefit.”\textsuperscript{340} If the death instead occurs before the coach has reached age fifty-five, the beneficiary may be eligible for a benefit depending on the portion of the accrued benefits that have vested.\textsuperscript{341}

E. Forfeitures and Reemployment

When coaches terminate their employment with a club, the non-vested portion of their benefits will be forfeited.\textsuperscript{342} If the coaches have yet to receive a distribution, they will retain both their years of credited and vesting service.\textsuperscript{343} If terminated coaches have received the entire vested percentage of their benefit, “all Credited Service credited to [them] at the time of [their] termination will be forfeited.”\textsuperscript{344} An exception exists, however, if the coaches’ benefits have not fully vested.\textsuperscript{345}

Coaches receiving a benefit under the Plan, but who are later reemployed by a club, will have their payments stopped during their reemployment.\textsuperscript{346} Once they have re-retired, their pension benefits will be recalculated.\textsuperscript{347} Payments will then resume upon the earlier of the subsequent retirement or the employee reaching the age of seventy and a half.\textsuperscript{348} These benefits “will be actuarially reduced to reflect the value of . . . previously paid benefits.”\textsuperscript{349}

F. Forms of Payment

There are two default forms of payment: one for unmarried coaches and one for married coaches. While unmarried coaches can receive a straight-life annuity, which pays an equal monthly payment for the rest of their lives,

\textsuperscript{340} NAT'L FOOTBALL LEAGUE, SUMMARY OF PLAN PROVISIONS – COACHING 3 (on file with author).
\textsuperscript{341} Id. at 3-4.
\textsuperscript{342} NAT'L FOOTBALL LEAGUE, supra note 293, at 15.
\textsuperscript{343} Id. An employee’s vesting service is always retained.
\textsuperscript{344} Id.
\textsuperscript{345} Id. The employee must (1) become an employee of a club within five years of his termination or (2) “repay the amount of distribution with interest” at “the close of the first period of [five] consecutive [one]-year breaks in service commencing after [the employee] receive[s] the distribution.”
\textsuperscript{346} Id.
\textsuperscript{347} Id. at 16.
\textsuperscript{348} Id.
\textsuperscript{349} Id.
married coaches can obtain a “joint and 50% survivor annuity.” Under this latter payment, coaches receive a reduced monthly benefit for their lifetime. Upon death, their spouses receive monthly payments “equal to 50% of the benefit that [the coaches] were receiving.” Optional forms of payment include a ten-year certain and life annuity, lump sum payment, and joint and 50%, 66-2/3% or 100% survivor annuity. Married employees must have their spouse’s consent if they choose an optional form of benefit. They must also receive spousal consent if they (1) opt for a payment plan other than a joint and survivor annuity and (2) wish to receive early retirement benefits valued at more than $3500.

While the entire plan is not insured against loss, “certain benefits under this Plan are insured by the Pension Benefit Guaranty Corporation (PBGC).” The PBGC is supported by the federal government and was created as part of the Employee Retirement Income Security Act. Currently the PBGC will cover up to $3971 a month, but this amount is adjusted annually.

350. Id. at 18.
351. Id.
352. Id.
353. Id. An employee must submit a written explanation to the Plan Administrator if he chooses an optional form. Id. at 19. This must be done not more than ninety days prior to the benefit commencement date. Id. Once payments have begun, an employee may not change his choice. Id. If an employee dies before payments commence, any options he may have elected prior to death may be voided, and instead a death benefit may be payable. Id. at 20.
354. Id. at 18. Under this plan, an employee (or his beneficiary) is guaranteed 120 monthly payments no matter how long he lives. Id.
355. Id. at 19. This involves a single cash payment with large tax implications. It is available to coaches (1) over the age of sixty-five or (2) over the age of fifty-five with at least five years of professional experience and no "professional employment in football for at least six months." NAT’L FOOTBALL LEAGUE, supra note 340, at 7.
356. NAT’L FOOTBALL LEAGUE, supra note 293, at 19.
357. Id. at 20.
358. Id.
359. Id. at 27.
360. Defined-Benefit Pension Plans: Current Problems and Future Challenges Before S. Comm. on Finance (2005) (statement of Douglas Holz-Eakin, Dir., PBGC), available at http://www.cbo.gov/ftpdocs/64xx/doc6414/06-07-PBGC.pdf. The PBGC is not officially backed by the U.S. government. Id. Currently, the future solvency of the PBGC is in question. Id. at 5. Some argue that the insurer will be completely insolvent by 2013. Id. Even though, as mentioned, the PBGC was created under government supervision, it is not backed with the "full faith and credit of the U.S. Government." Id. As such, if the PBGC becomes insolvent, the guarantee could become worthless unless the treasury intervenes, the occurrence of which is left to political debate beyond the scope of this article. Id.
361. Pension Benefit Guarantee Corporation, Maximum Monthly Guarantee Tables,
i. Domestic Relations Orders

Coaches who divorce or whose spouses die after electing a form of payment may revoke that election prior to the benefit commencement date.\(^{362}\) However, domestic relations orders are the exception to the rule.\(^{363}\) A spouse, former spouse or dependent may have the right "to receive all or part of [a coach's] benefits under the Plan" if a court order has been issued relating to "the provision of child support, alimony payments, or marital property rights."\(^{364}\)

G. The Rule of 75 — A Pension Bonus

Under the Rule of 75 (Rule), the NFL offers coaches who retire between the ages of fifty-eight and sixty-five an additional source of benefits as a holdover prior to their reaching normal retirement age.\(^{365}\) The Rule was given its name since it applies only to coaches whose age plus years of credited service, at the end of employment, add up to at least seventy-five.\(^{366}\) Without the Rule, coaches would have to wait until normal retirement age to receive their full benefits under the Plan and the SERP. NFL coaches have a similar opportunity to receive early retirement benefits prior to their normal retirement date under the Plan; however, these benefits are adjusted by multiplying their accrued benefit by a percentage in the Early Commencement Table.\(^{367}\) Under the Rule, retirees receive a monthly payment equal to their "total monthly accrued benefit under [the Plan]."\(^{368}\) Besides the qualifications discussed above, coaches must also meet the following criteria to qualify for the Rule:

- Have earned at least 10 years of Credited Service while a coach;
- Have earned at least one year of Credited Service during the 2000 Season or later as a coach;


\(^{363}\) NAT'L FOOTBALL LEAGUE, supra note 293, at 20.

\(^{364}\) Id. at 25. Domestic relations orders are also an exception to the general rule that benefits cannot typically be pledged, assigned, borrowed against, or alienated. Id. Benefits are also "not subject to legal processes such as attachment or garnishment." Id.

\(^{365}\) Id.

\(^{366}\) NAT'L FOOTBALL LEAGUE, RULE OF 75 PLAN FOR NFL COACHES: SUMMARY OF PLAN PROVISIONS 1.

\(^{367}\) Id.

\(^{368}\) NAT'L FOOTBALL LEAGUE, supra note 293, at 11 (emphasis added).

\(^{368}\) NAT'L FOOTBALL LEAGUE, supra note 365, at 1 (emphasis added).
• Have earned at least $125,000 of compensation for each of [their] last two coaching years of Credited Service; . . .

• Not have received a lump sum after July 1, 2000 or have begun to receive a monthly benefit prior to age 65 from the NFL Club Employees Pension Plan.369

The intentions of the Rule are clear since it does not allow coaches to collect from both the Rule and the Plan at the same time. Instead, the Rule rewards coaches who have served a significant amount of time in the League by allowing them to start receiving their benefits at age fifty-eight instead of age sixty-five without having them discounted. A coach worried about receiving his full benefits does not have to work to the age of sixty-five and can retire earlier under the Rule, presuming he satisfies all of the necessary requirements listed above. Once coaches reach the age of sixty-five, the Rule is no longer applicable, and they will instead receive their benefits through the Plan.370 Although payments under the Rule will stop if a coach dies before the age of sixty-five, one can opt for a joint and fifty percent spouse’s annuity, in which case the spouse will receive benefits upon the coach’s death.371

H. Retirement Benefits: A Brief Review

While the NFL’s defined benefit plan is risky for the NFL’s clubs, it provides steady rewards for the coaches. Under a defined contribution plan, coaches would direct their own investments, bearing the risks themselves. Under the Plan and SERP, the NFL is forced to pay the benefits determined by the formulas irrespective of the investment success of the retirement assets. As added protection for retirement plan participants, a quasi-governmental corporation insures these payments. In this respect, the NFL stands apart from the majority of businesses, which have switched over to defined contribution plans.

The Plan also provides coaches with a great amount of flexibility. Certain employees have the option of receiving payments before the normal retirement age. Others have the option to postpone their benefits. In addition, unlike most defined benefit plans, the Plan allows the benefits to continually accrue even if the coach switches clubs. The Plan provides for a variety of ways in which coaches – regardless of their marital status – can receive payments.

Finally, the League’s Plan offers a unique “Rule of 75” feature that provides incentive for coaches who have been in the league for a while to

369. Id.
370. Id. at 2.
371. Id. at 1.
continue coaching past the age of fifty-eight. Instead of forcing coaches to receive discounted payments under the early retirement plan, the Rule allows coaches to continue to receive their full benefits under the Plan.

VII. A BETTER INFORMED MARKETPLACE: IS IT POSSIBLE? IS IT PERMISSIBLE?

A. Current System

Currently, members of the NFLCA receive annual salary surveys that aggregate salary information for a given coaching position (Salary Surveys – See Exhibit A and B attached hereto).372 Attached as Exhibit A to this article is the 2005 Salary Survey; attached as Exhibit B are the 2006 through 2008 Salary Surveys as of December 1, 2006. The NFLCA’s Salary Surveys are typically completed at the end of the season by the club’s designated representative to the NFLCA. As such, this process necessarily yields historical data. Conspicuously absent in these reports is salary information for NFL head coaches. Although the salaries of most NFL head coaches are widely reported, they are rarely subject to independent verification. This is a matter of particular importance to coaches and clubs alike, as salaries in the sports industry are frequently established from the top down. Consequently, although the salary surveys are a useful tool for NFLCA membership, several factors further dilute their value. The fundamental challenge to using such surveys is that they are bereft of sufficient contract details to make specific comparisons – an exercise at the heart of negotiations for NFL free agent players. For negotiation purposes, in addition to confirming base salaries and bonus criteria and payments, it would be helpful for coaches and clubs alike to know at least the following with which to compare: (1) record or reputation for results (for the coach and the club); (2) duties required under the contract; (3) the location of the contracting club for cost of living and tax purposes; and (4) years of coaching experience.

Coaches and club representatives interviewed in conjunction with this article, without exception, uniformly recited the benefits of accurate and specific contract information. Moreover, representatives of each group expressed no concern that the other group may be privy to the same

372. NAT’L FOOTBALL LEAGUE COACHES ASS’N, supra note 38 (providing averages, minimums, maximums and experience levels for the following position (e.g., assistant) coaches: assistant defensive backs, assistant defensive line, assistant head, assistant offensive line, assistant special teams, assistant to head coach, defensive backs, defensive assistant, defensive coordinator, defensive line, linebackers, offensive assistant, offensive coordinator, offensive line, outside linebackers, quarterbacks, running backs, special teams, strength, strength assistant, tight ends and wide receivers).
In fact, the impetus for this article resulted from several club representatives’ frustrations in negotiating coaching contracts with little information or a perceived abundance of misinformation.\textsuperscript{373} In concert with the club's position regarding a lack of accurate information, the NFLCA also welcomes the sharing of more specific and accurate information among its constituents (and with the clubs) as the most valuable means to bolster salaries and improve contract terms. Satisfying both NFL coaches’ and NFL clubs’ desires for more and better coaching contract information requires a careful analysis of legal options.

\textbf{B. A Review of Relevant Antitrust Law}

United States Supreme Court precedent developed the framework for identifying the factors that weigh in favor of a determination that sharing market information is either, on balance, illegal anti-competitive behavior or permissible pro-competitive activity.\textsuperscript{374}

In the 1925 Supreme Court case \textit{Maple Flooring Manufacturers Ass'n v. United States},\textsuperscript{375} the defendants were members of an unincorporated association of twenty-two flooring manufacturer/sellers that, at the time, produced seventy percent of the United States' output of maple, beech and birch flooring.\textsuperscript{376} Association members shared flooring industry information concerning the average cost of all dimensions and grades of flooring, flooring freight rates from a central location to approximately 6000 points of delivery, quality and price information, stock on hand and the rate of sales commissions paid.\textsuperscript{377} Such information was reported to members via weekly written reports and during regular meetings at which the members discussed industry trends.\textsuperscript{378} Trial court testimony revealed that future prices became the subject of discussion outside of the regular meetings, notwithstanding the association's counsel admonishment to members not to discuss future

\textsuperscript{373} Currently, the NFL clubs do not formally share coaching contract information in any manner via a trade association or similar vehicle. It is widely rumored, however, that NFL executives routinely discuss coaching salaries, industry trends and the details of current coaching contract negotiations. Such inter-club activities are expressly prohibited in the context of negotiating NFL player contracts and carry severe penalties including the termination of a club's player rights and fines up to two million dollars. See \textit{NAT'L FOOTBALL LEAGUE, supra} note 7, art. XXVIII.


\textsuperscript{375} \textit{Maple Flooring}, 268 U.S. 563.

\textsuperscript{376} \textit{Id.} at 565–66.

\textsuperscript{377} \textit{Id.} at 566–67.

\textsuperscript{378} \textit{Id.}
Importantly, the record in *Maple Flooring* was bereft of evidence establishing that the members reached agreement to produce a given effect on commerce other than which would normally flow from the association's activities. In ruling in favor of the defendant association members, the Supreme Court held that no unlawful restraint of trade occurs as a result of the natural effect of better informed market participants. Simply put, the Supreme Court acknowledged that the dissemination of pertinent market information tends to stabilize and produce uniformity of price and practices—a consequence that, by itself, is not unlawful. Significant to the *Maple Flooring* Court's decision was the fact that reported and published price information dealt exclusively with past and closed transactions. *Maple Flooring* further confirmed a fundamental tenet of analyzing Sherman Act cases: "each case . . . must be determined upon the particular facts disclosed by the record" and considered with "a clear recognition of the essential differences" between the facts of prior decisions and the facts of the case at bar.

Eleven years after its *Maple Flooring* decision, the U.S. Supreme Court again addressed the federal government’s allegations of price fixing resulting from the announcement of sugar prices and sales terms among fifteen members of a trade association of sugar refinery companies. At the time of the suit, the defendants refined "practically all the imported raw sugar processed in this country." The association adopted a Code of Ethics; its distinctive feature was "a requirement of adherence, without deviation, to the prices and terms publicly announced" by the collective membership. The district court concluded that notwithstanding the association’s assertions that such practices were necessary to remedy a history of deceptive practices in the sugar industry, such practices were nonetheless an unreasonable restraint of trade in violation of Section 1 of the Sherman Act. In affirming the district

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379. *Id.* at 575.
380. *Id.* at 577.
381. *Id.* at 582.
382. *Id.*
383. *Id.* at 584. "Competition does not become less free merely because the conduct of commercial operations becomes more intelligent through the free distribution of knowledge of all the essential factors entering into the commercial transaction." *Id.* at 583.
384. *Id.* at 579.
386. *Id.* at 571-72.
387. *Id.* at 582.
388. *Id.* at 592-93.
court's findings, the Supreme Court condemned the defendants' practice of compelling compliance to their directives yet expressly accepted the practice of announcing price information as permissible under the Sherman Act.\textsuperscript{389} Integral to the trial court and Supreme Court's decision was the fact that sugar is a standardized commodity\textsuperscript{390} and that by collecting and circulating vital data among only members of the trade association, the defendants obtained an unfair advantage with respect to purchasers.\textsuperscript{391} "[P]rice, not brand, was always the vital consideration."\textsuperscript{392}

More recently, the Second Circuit addressed the issue of salary sharing among a consortium of oil and petrochemical companies that collectively accounted for eighty to ninety percent of the industry's revenues and which employed approximately the same percentage of the industry's work force.\textsuperscript{393} In \textit{Todd v. Exxon Corp.},\textsuperscript{394} the plaintiff alleged that the defendant oil companies' salary information practices constituted a violation of Section 1 of the Sherman Act.\textsuperscript{395} These practices included: (1) the dissemination of salary surveys consisting of as few as three companies at a time, and (2) regular meetings at least three times per year to discuss and exchange salary and salary related information including the discussion of individual company's current and future salary budgets for employees.\textsuperscript{396}

Unlike the traditional horizontal conspiracy case that involves an agreement among sellers, the purpose of which is to raise prices to super-competitive levels, the \textit{Todd} court recognized that the Sherman Act also applies to the abuse of market power on the buyers' side in the form of monopsony or oligopsony power.\textsuperscript{397} The market in \textit{Todd} was comprised of buyers (oil companies) who were viewed by sellers (employees) as being reasonably good substitutes.\textsuperscript{398} In this respect, the facts of the \textit{Todd} case are similar to the market for coaching jobs in the NFL. Most coaches likely view NFL clubs as a limited number of relatively fungible employers. And while the risk to sellers in the context of an oligopsony is that buyers will collude to

\textsuperscript{389} \textit{Id.} at 601 ("The unreasonable restraints which defendants imposed lay not in advance announcements, but in the steps taken to secure adherence, without deviation, to prices and terms thus announced.").

\textsuperscript{390} \textit{Id.} at 600.

\textsuperscript{391} \textit{Id.} at 597.

\textsuperscript{392} \textit{Id.} at 573.

\textsuperscript{393} \textit{Todd v. Exxon Corp.}, 275 F.3d. 191, 195 (2d Cir. 2001).

\textsuperscript{394} \textit{Id.}

\textsuperscript{395} \textit{Id.}

\textsuperscript{396} \textit{Id.} at 196–97.

\textsuperscript{397} \textit{Id.} at 201.

\textsuperscript{398} \textit{Id.} at 202.
depress prices, the Todd court instructed that "information exchange is not always anticompetitive and can enhance competition by making competitors more sensitive to each other's price changes, enhancing rivalry among them."\textsuperscript{399}

The Todd court identified two factors as significant to determine whether a given market is susceptible to the exercise of market power through passive coordination.\textsuperscript{400} Susceptible markets tend to include at least the following two characteristics: (1) highly concentrated markets (i.e., where the defendants maintain an extremely high market share of information by most measures); and (2) fungible products subject to inelastic demand.\textsuperscript{401} The foregoing facts are designed to determine the market price of the defendant. Yet, in making such a determination, the Second Circuit acknowledged that identifying an under-inclusive market can be fatal to a plaintiff's claim. In other words, the availability of alternative employment opportunities outside the defined market constrains the ability of industry conspirators to limit salary increases to the point where they become anticompetitive.\textsuperscript{402} In vacating and remanding the district court's grant of the defendants' motion to dismiss, the Todd court noted that the public dissemination of information is a primary way for data exchange to realize its pro-competitive potential, yet it was troubled by the defendants' alleged participation in frequent meetings to discuss future and current salary information and the confidential treatment of the information exchanged.\textsuperscript{403}

A federal court has already considered the antitrust implications of sharing NFL salary information among members of a trade association.\textsuperscript{404} In 1992, each of the NFL clubs joined in a suit against the NFLPA alleging that the association's agreement to exchange price information (e.g., players' salaries) with agents was a per se antitrust violation because it evidenced the existence of a broader conspiracy to fix, raise, stabilize or maintain prices.\textsuperscript{405} The clubs'

\textsuperscript{399} Id. at 214 (citing United States v. U.S. Gypsum Co., 438 U.S. 422, 441 n.16 (1978); Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563, 582-83 (1925)).

\textsuperscript{400} Id. at 208.

\textsuperscript{401} Id. at 208-09. Inelastic demand is an economic term which means that the level of demand for a given product or service remains relatively constant irrespective of the available supply of such product or service.

\textsuperscript{402} Id. at 204.

\textsuperscript{403} Id. at 213.


\textsuperscript{405} Id. at 1045. "The per se rule is limited to certain categories of agreements that are so plainly anticompetitive and lacking in redeeming virtue that they are conclusively presumed to be illegal without elaborate inquiry into the precise harm that they have caused or their business justifications." Id. See, e.g., N. Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).
complaint further alleged that the salary exchange constituted a rule of reason violation because it generated the anticompetitive effect of forcing clubs to pay higher salaries than they would have in the absence of such an exchange.\(^\text{406}\) It is important to consider that, at the time of this lawsuit, the NFLPA had decertified as a union and was operating as a trade association just as the NFLCA operates today.\(^\text{407}\) In granting the NFLPA's motion to dismiss, District Court Judge Doty—at that time and to this day the most experienced judge on matters concerning the NFL and antitrust—ruled that the NFL's per se and rule of reason allegations failed to state viable claims.

The *Five Smiths* court held that any exchange of salary information between players or their agents should not be subject to the per se rule because such an exchange "occurs in an environment where most players are not able to compete for the same jobs on the same teams."\(^\text{411}\) The court reasoned that even assuming some players were competitors, "an exchange of information among competitors is not within any of the categories of conduct that is so manifestly anticompetitive as to warrant per se condemnation."\(^\text{412}\) Moreover, the *Five Smiths* opinion cited ample authority for the proposition that "[t]he exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive."\(^\text{413}\) "[T]he unique nature of the business of

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\(^{406}\) *Five Smiths*, 788 F. Supp. at 1045. "In order to state a rule of reason claim under section 1 of the Sherman Act, a plaintiff must allege concerted action that is intended to harm or unreasonably restrain competition and that actually causes such injury to competition." Id. at 1051; Rosebrough Monument Co. v. Mem'l Park Cemetery Ass'n, 666 F.2d 1130, 1138 (1981).

\(^{407}\) At the time of this lawsuit, the NFLPA had declared itself no longer a labor union—a negotiation tactic employed to strip the NFL clubs of the nonstatutory exemption to the antitrust laws. See *Powell v. Nat'l Football League*, 764 F. Supp. 1351, 1354 (D. Minn. 1991).

\(^{408}\) Judge Doty has rendered some of the most important and instructive decisions in the history of the NFL. See, e.g., *White v. Nat'l Football League*, 836 F. Supp. 1458 (D. Minn. 1993) (approving settlement in a class action suit brought by players against the NFL, which effectively eliminated Plan B free agency, and holding that the settlement agreement was not *per se* illegal under anti-trust laws; *McNeil v. Nat'l Football League*, 790 F. Supp. 871 (D. Minn. 1992) (involving an antitrust challenge to the NFL's Plan B free agency system pursuant to which each of the then twenty-eight NFL clubs could designate thirty-seven players on its roster as protected players, irrespective of their free agency status, subject to a right of first refusal/compensation system contained in an expired collective agreement); *Powell v. Nat'l Football League*, 764 F. Supp. at 1351. The settlement of the *Powell/McNeil/White* trilogy of cases and related ancillary suits spawned the NFL and NFLPA's 1993 Collective Bargaining Agreement—the model for labor peace and posterity in professional sports.

\(^{409}\) *Five Smiths*, 788 F. Supp. at 1051.

\(^{410}\) Id. at 1055.

\(^{411}\) Id. at 1046.

\(^{412}\) Id. at 1046-47.

\(^{413}\) Id. at 1047 (citing United States v. U.S. Gypsum Co., 438 U.S. 422, 441 n.16 (1978)).
professional football renders it inappropriate to mechanically apply per se illegality rules."^{414}

In denying the NFL's rule of reason claim, the court in *Five Smiths* relied upon well-settled principles regarding the exchange of price and other market information.^{415} "Competition does not become less free merely because the conduct of commercial operations becomes more intelligent through the free distribution of knowledge of all the essential factors entering into the commercial transaction."^{416}

**C. The Coaching Market's Susceptibility to Wage Fixing**

The history of relevant information sharing cases demonstrates that markets susceptible to price fixing include standardized or fungible goods or services and inelastic demand for such goods or services. Neither of these factors characterizes the market for NFL coaches.

**i. NFL Coaches Are Becoming Increasingly Specialized and Unique**

Coaches are not fungible. As individuals, that is axiomatic. And, as is true with most professionals, each coach's nature and level of experience makes him relatively more or less attractive to NFL clubs considering his hire among other qualified and available candidates. Similar to the NFL players in *Five Smiths*, a given coach's contractual obligations and status under the NFL's anti-tampering policy virtually assures a unique and different, perhaps dramatically different, candidate pool from year to year. Finally, in recognition of the Second Circuit's admonishment against underinclusive markets for purposes of antitrust review, consideration of the NFL coaching market must also include at least a portion of coaches from the college ranks, the Arena Football League, the Canadian Football League and the NFL-Europe League. Consequently, as sellers in this market, each coach's

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414. *Five Smiths*, 788 F. Supp. at 1048 n.6 (citing Mackey v. Nat'l Football League, 543 F.2d 606, 619 (8th Cir. 1976)).

415. *Id.* at 1052-53 (citing Sugar Inst. Inc. v. United States, 297 U.S. 553, 598 (1936); Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563, 582 (1925)).

416. *Maple Flooring*, 268 U.S. at 583. In *Maple Flooring*, the Supreme Court decided that trade associations which openly and fairly gather and disseminate information regarding the product's cost, its volume or production, the actual price which the product has brought in past transactions, stocks or merchandise on hand, approximate cost of transportation from the principal point of shipment to the points of consumption and meetings to discuss such information and statistics, without however reaching or attempting to reach any agreement or any concerted action with respect to prices or production or restraining competition, do not engage in unlawful restraint of trade. *Id.* at 586.
experience, skill set, contractual circumstances and professional contacts create a dynamic mosaic of employment candidates every year.

Perhaps less obvious than the uniqueness of a given coach is the uniqueness of NFL coaching positions, notwithstanding their titular similarities. Consider, for example, the position of offensive line coach for the Cincinnati Bengals. Currently, that position is owned by veteran offensive line coach Paul Alexander. The Bengals' offensive scheme primarily incorporates a man blocking design with various trap and combination blocks coordinated among the offensive linemen, ends and backs. Because the Bengals maintain a small scouting department, a significant part of Coach Alexander's job responsibilities include evaluating offensive line talent that fits the requirements of the Bengals' current offensive blocking scheme. So, in addition to coaching and teaching his unique style of technique to the Bengal offensive linemen operating in this scheme, Coach Alexander must also scout and select linemen with characteristics conducive to success in such scheme. Such responsibilities virtually eliminate the possibility of an inexperienced coach landing the offensive line coaching position with the Bengals.

ii. NFL Clubs’ Demand for Coaches Is Not Inelastic

The composition of NFL coaching staffs can be as unique as the men who occupy such positions. Since 1970, when Coach George Allen hired Coach Marv Levy as the NFL's first special teams coach, NFL clubs have not only exponentially expanded the number of positions on their coaching staffs but also the responsibilities that accompany each position. Currently, nineteen of the NFL's thirty-two clubs list staffs of eighteen or more assistants. Including strength and conditioning coaches, five clubs maintain assistant coaching staffs of twenty or more. Currently, only three clubs maintain

417. A "man" blocking scheme can be distinguished from a "zone" blocking scheme currently employed by clubs such as the Broncos and Falcons.


419. Judy Battista, Hold That Line But Don't Hesitate to Supersize the Coaching Staff, N.Y. TIMES, July 12, 2006, at D1.

420. Id.
assistant coaching staffs of fifteen or less, one of these abbreviated staffs belongs to the New England Patriots. The advent of free agency and the ever-increasing complexity of the game spawned the need for so much division of labor. Because of greater roster turnover, players require more instruction in new or more challenging offensive or defensive schemes. Consequently, each club maintains unique requirements for coaching talent based on its current coaching staff and player roster. From year to year, some NFL staffs may remain entirely intact while others will be completely overhauled, including perhaps the implementation of a new division of labor between the front office staff and the coaching staff on such hybrid activities as scouting.

The uniqueness and elasticity of demand for coaches was recently on display. Consider the 2006 head coaching searches by three members of the North Division of the NFL's National Football Conference (NFC): the Detroit Lions, the Green Bay Packers and the Minnesota Vikings. Each one of these franchises announced the hiring of its new coach within two weeks of the others, and yet, only two candidates who interviewed with all three clubs were the same (Coaches Maurice Carthon and Tim Lewis). Neither coach was ultimately hired by any of the clubs, nor was reported to have been offered either head coaching job.

Recognizing that NFL division winners receive

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421. Id.
422. Id.
423. During Mike Martz's tenure as head coach of the St. Louis Rams, the club's 260-page offensive playbook, often referred to as the "War and Peace" Playbook, included an estimated 500 plays with numerous blocking and assignment variations. See Steve Korte, Rams Preparing Wilkins to Replace Hakim, BELLEVILLE NEWS-DEMOCRAT (Belleville, IL), Aug. 5, 2002, at 1D; Leonard Shapiro, Martz Puts the Ram in Rampage; Coach is Mastermind of Dazzling Offense, WASH. POST, Nov. 18, 2000, at D01; Lori Shontz, QB or not QB? Who Knows?, ST. LOUIS POST-DISPATCH, Aug. 29, 2004, at 4. Similarly, shortly after his move to the Detroit Lions was announced, the Martz playbook featured 240 passing plays during Detroit's preseason camp. Bernie Miklasz, Haslett, Martz Face Challenge of Rebuilding Reputations, ST. LOUIS POST-DISPATCH, July 27, 2006, at C1.
424. Coaching Carousel, PRO FOOTBALL WKLY., Jan. 4, 2006, available at http://www.profootballweekly.com/PFW/Features/NFL+Features/2006/CoachCarousel.htm. The Detroit Lions hired Buccaneers assistant head coach and defensive line coach Rod Marinelli on January 19, 2006. Id. The Lions also interviewed Broncos offensive coordinator Gary Kubiak, former Saints head coach Jim Haslett, Browns offensive coordinator Maurice Carthon, Steelers offensive line coach Russ Grimm, Giants defensive coordinator Tim Lewis, Lions interim head coach Dick Jauron and Forty Niners linebacker coach and assistant head coach Mike Singletary. Id. The Green Bay Packers hired Forty Niners offensive coordinator Mike McCarthy on January 12, 2006. Id. The Packers also interviewed Cowboys assistant head coach/passing-game coordinator Sean Payton (who was ultimately hired weeks later by the New Orleans Saints), Browns offensive coordinator Maurice Carthon, Bears defensive coordinator Ron Rivera, Chargers defensive coordinator Wade Phillips, Giants defensive coordinator Tim Lewis and Packers defensive coordinator Jim Bates. Id. The Minnesota Vikings hired Eagles offensive coordinator Brad Childress on January 6, 2006. Id. The Vikings also interviewed their then current defensive coordinator Ted
automatic playoff births, it stands to reason that hiring a coach who could win the NFC North had to be one of, if not the, most important consideration in the hiring process. An analysis of the process and results of this intra-division exercise, concurrently undertaken, bolsters the conclusion that each of these organizations maintained its own opinion about what it takes to win the NFC North and which coaches possessed the skills and resources to accomplish that feat. In other words, each NFL club’s perception of a particular coaching candidate is perhaps more unique than the coach himself. Finally, add to this dynamic the fact that coaching salaries, unlike those of NFL players, are not subject to a salary cap, and it follows that the market demand for coaches’ services, including their salaries, is relatively more elastic and less price sensitive than those of NFL players—a group that has already been permitted to share with its members detailed market information outside the protections of the non-statutory labor exemption to antitrust.

D. Coaching a Better Game: Intelligent Markets Without Penalties

An aggregate reading of the established precedent in this area coupled with the realities of the NFL coaching market counsels in favor of clubs and coaches collectively undertaking the following activities designed to satisfy each group’s need for accurate market information without running afoul of the Sherman Act.

i. Work Together

Clubs and coaches have less to fear in terms of litigation and much more to gain if they coordinate their efforts. This action may also immunize either party from a civil antitrust lawsuit from the other concerning information sharing. Recognizing that some coaches already share survey information with their front offices and that only a small percentage of NFL coaching contracts currently proscribe the dissemination of contract terms, this is a small step to take relative to its value. Moreover, an analogous procedure for information sharing has already been established in the context of NFL clubs and NFL players.

Cotrell, Chiefs offensive coordinator Al Saunders and Colts assistant head coach/quarterback coach Jim Caldwell. Id. The club affiliation of the aforementioned head coaches was as of the date of the interview. Id.

425. NAT’L FOOTBALL LEAGUE, supra note 7, art. XXIV § 4.


427. NAT’L FOOTBALL LEAGUE, supra note 7, art. XXX, at §§ 1-6. This provision of the NFL’s CBA also provides for a third party "neutral verifier" to confirm the accuracy of shared information.
ii. Establish a Bipartisan Trade Association

Each year the clubs and coaches could appoint an independent third party to serve as a repository for NFL coaching contracts. In a joint statement released by the U.S. Department of Justice Antitrust Division (Antitrust Division) and the Federal Trade Commission (FTC) regarding antitrust in health care, the use of a "trade association" to serve as a third party to collect and disseminate survey information is specifically approved.\textsuperscript{428}

iii. Collect and Disseminate Historical Data

The Antitrust Division and FTC recommended that to qualify for an "antitrust safety zone," wage and price surveys should ask about only wages paid or prices charged at least three months prior to the date survey participants complete the survey. Disclosure of current negotiation information will likely be viewed with a scrutinizing eye by antitrust regulators and would-be plaintiffs, and surveys of future or projected compensation are very likely to be considered anticompetitive. The current timing of the NFLCA's survey works well to comply with this guideline, as contract information is collected no sooner than the season after the contract is signed, approximately one year later.

iv. Publish Salaries

It generally is advisable for an association to make its survey results and other industry research available to both members and nonmembers. Undoubtedly, this information carries with it enormous public interest. Consequently, a single press release of historical contract information could generate enormous coverage across all media and further discount any anticompetitive advantage enjoyed by a market participant. Although some coaches may be apprehensive about the public dissemination of their contract's terms, the media is increasingly reporting such information anyway (accurately or not), and NFL coaches can take solace in the fact that their collegiate brethren have been subject to such reporting for years.\textsuperscript{429}

\textit{Id.} § 4.

\textsuperscript{428} See U.S. Dept. of Justice and Federal Trade Comm'n, Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust, 4 TRADE REG. REP. (1993). Officials from the FTC have stated that the principles, while nominally focused on the health care industry, are broadly applicable to other industries and professions.

\textsuperscript{429} The Freedom of Information Act, 5 U.S.C. § 552 (1966), as amended by Public Law 104-231, and states' Sunshine Laws require the publishing of contract information for all government employees.
v. Avoid Unregulated Discussions of the Results

As the case law in this area amply demonstrates, the problem with salary and price surveys is not the surveys themselves, but what competitors do with the information they receive. Thus, the association should discourage improper discussion of the data bank information and never discuss on-going or future contract negotiations or terms. Currently, unregulated discussion of NFL coaches' contract terms is alleged to be rampant. Educating the market, however, will alleviate the need for such banter. Informed NFL executives and experienced coach agents need little advice or support to negotiate employment contracts.

vi. Make Participation Voluntary

Do not require coaches or clubs to contribute to the data bank or prescribe penalties for non-participation. To be sure, such a policy will require cooperation among otherwise hyper-competitive participants. Less than total cooperation could doom the process, however, and the recognition of such dire consequences is thus likely to secure the program's productive existence.

vii. Commission a Department of Justice Expedited Business Practice Review

The Antitrust Division allows persons seeking business review determinations to request the same from the Antitrust Division. The Antitrust Division's summary of this process indicates that a proposal to collect and disseminate business information is one of the two most frequent types of business review requests. The NFL clubs and coaches must satisfy the Antitrust Division's request for information and documents necessary to conduct the review. Although the Antitrust Division will not commit to a

430. 28 C.F.R. § 50.6 (2005).
432. Id. at 7-8. Information sufficient to show:
   1. The persons or firms expected to participate in the information exchange;
   2. The purposes and objectives of the information exchange;
   3. The nature, type, timeliness, and specificity of the information to be exchanged (a sample of all information to be exchanged should be provided);
   4. The method by which the information will be exchanged;
   5. The characteristics of the market(s) in which the information will be exchanged, including the product(s) or service(s) related to the information to be exchanged, the homogeneity of the product(s) or service(s), the pricing and marketing practices typically employed by firms in the market(s), and the availability of information concerning market conditions, individual transactions and individual
rigid deadline for processing reviews, the targeted time frame for resolving business reviews is within sixty to ninety days of receipt of the request.\textsuperscript{433} This process gives the NFL coaches and clubs the opportunity to test the antitrust waters and make modifications as necessary to establish compliant practices.

VIII. CONCLUSION

While the foregoing course of action may appear to be an enormous departure from the current system, it must be remembered that: (1) based on the accounts of market participants,\textsuperscript{434} the current system leaves much to be desired; (2) current practices are not only ineffective, but lead to conduct (i.e., discussion of coaches salaries among NFL clubs' executives) that is actionable under the antitrust laws; and (3) other employment markets have already implemented practices virtually identical to those prescribed above. Regarding the last point, the market for lawyers presents a worthy example. If one considers all sectors of this country's employment markets, it is logical to conclude that the legal market should be the one most keenly aware of antitrust restrictions limiting the dissemination of market information. Yet, ask any third year law student (as such not even a member of the market yet) the starting salaries for lawyers in their desired location of employment, and he or she will be able to rattle off more employment information than most of the subject firms' partners. How? Why?

The legal marketplace works as follows. Typically, a leading firm in a given geographic market (usually a city) will set a starting salary and then

\begin{itemize}
\item[6.] The identity and competitive significance (described in terms of market shares, capacities, etc.) of persons or firms that participate in the relevant product and geographic markets, but will not participate in the information exchange;
\item[7.] The ten largest customers in the relevant geographic market for any product(s) or service(s) involved in the information exchange and an estimate of their annual purchases;
\item[8.] Any safeguards that are planned to prevent disclosure of firm-specific information to competitors; and
\item[9.] Any business synergies, efficiencies or other benefits likely to flow from the venture.
\end{itemize}

All documents:

\begin{itemize}
\item[1.] Reflecting or representing the agreement(s) among the parties to exchange information or the most recent drafts of such documents; and
\item[2.] Discussing or relating to the legality of illegality under the antitrust laws of the information exchange or the impact of the information exchange on competition or the price of any product or service.
\end{itemize}

\textsuperscript{433} Id. at 4.

\textsuperscript{434} Larry Keenan indicated that his membership would "celebrate" access to more and better market information. Telephone Interview with Larry Kennan, supra note 233.
publicize such salary. Other firms competing for the same level of legal talent in that geographic market will follow by setting their firm's starting salary at or near the lead firm's standard. Such a practice is commonly referred to as conscious parallelism or tacit collusion, conduct not in itself unlawful absent circumstantial evidence tending to demonstrate an agreement to fix prices.

For thirty-five years, the National Association of Law Placement (NALP) has served as an employment information clearinghouse for lawyers based on cooperation between law schools and employers. Although NALP does not make salary prescriptions for given markets, it reports in considerable detail, salary and bonus information including the availability of signing bonuses and formula for calculating performance bonuses, expenses, dues and fee reimbursements, stipends, parking allowances, and moving expenses. NALP also publishes and requires recruiting guidelines for its constituents. Thus, the legal market is intensely monitored, and its employment terms and practices are not only disseminated, but in some aspects, prescribed.

While NALP only addresses the parameters for entering into the legal field, other publications offer information about the continued pay in the profession. For instance, The American Lawyer publishes an annual survey of the revenue and pay of the largest one hundred law firms. This type of survey makes the legal profession's compensation practices transparent to anyone in, or interested in, joining the legal job market.

The current marketplace for NFL coaches is inefficient and uninformed; it lacks procedures for identifying, collecting and disseminating important and comprehensive information. And, at least in the case of NFL clubs, its customs are ripe for antitrust scrutiny. NFL coaches and NFL clubs should and can implement tested practices for creating a more efficient and better informed market for coaches. The results of this exercise will benefit


436. The uniformity of starting salaries among top law firms in a given city eliminates coincidence as a cause.


both groups.
### EXHIBIT A
#### 2005 SALARY SURVEY

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