

Labor & Employment: How the National Football League got it all wrong

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In September 2015, a downstate federal court vacated the four-game suspension of New England Patriots quarterback Tom Brady for his role in last season's football tampering scandal, see *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, Nos. 15 Civ. 5916, 15 Civ. 5982, 2015 WL 514873 (SDNY Sept. 3, 2015). The decision is the latest in a string of losses for the National Football League, which has faced criticism for its recent handling of high-profile misconduct among its players.

Employers should pay careful attention to this story to avoid making the same mistakes as the NFL. Whether dealing with a collective bargaining agreement or a potential discrimination or retaliation claim, employers must have clearly written personnel policies, and must enforce these policies consistently and in good faith.

Don't drop the ball

During a playoff game last season, NFL officials discovered that the Patriots were using footballs that were inflated below the levels specified by the official rules. The alleged purpose of deflating the footballs was to make them easier for Brady to grip and throw.

The NFL hired an attorney from a highly regarded Manhattan law firm to conduct an investigation. His report concluded that "it is more probable than not that Tom Brady ... was at least generally aware" that New England equipment personnel were deflating game footballs.

The NFL suspended Brady, and he appealed. NFL Commissioner Roger Goodell appointed himself as the arbitrator who would hear the appeal, all but ensuring the suspension would be upheld. After a hearing, Goodell issued a decision, finding that Brady had induced New England staff to deflate footballs, and had directed others to destroy evidence to cover up his misconduct.

The players' union challenged the arbitration decision in federal court. The court vacated the decision, concluding that Brady lacked notice that he could receive a suspension for misconduct of this nature, and that certain procedural deficiencies affected the outcome of the arbitration. The NFL is appealing the decision.

Regardless of the results of the appeal, this case is a cautionary tale for all employers. Even a sophisticated business like the NFL can drop the ball when it comes to disciplining its employees.

Give clear notice

The NFL's position was undermined by its own inadequate personnel policies. In suspending Brady, the NFL cited to a provision in the CBA banning "conduct detrimental to the league." This provision prohibits players from fixing or betting on games, using or distributing banned substances, and "any other form of conduct reasonably judged by" Goodell to be "detrimental to the league." A player who violates this provision may be fined, suspended or terminated.

Goodell reasoned that letting air out of footballs was similar to using or distributing performance enhancing drugs. Accordingly, in choosing the duration of the suspension, he relied on the NFL's Steroid Policy, under which first-time offenders are suspended for four games. The court found this reasoning to be deeply flawed.

Critically, the Steroid Policy states that use of performance enhancing drugs "has been linked to a number of physiological, psychological, orthopedic, reproductive, and other serious health problems, including heart disease, liver cancer, musculoskeletal growth defects, strokes, and infertility." The court observed: "None of these factors is remotely present here."

By contrast, the NFL's employee handbook (League Policies for Players) specifically states that for equipment violations, "first offenses will result in fines." Strangely, the NFL had another policy manual (Game Operations Manual) that did permit suspensions for altering footballs or for failing to cooperate with an investigation, but this manual is not distributed to players. Thus, Brady was never put on notice that a first offense for misconduct of this nature could result in a suspension, only a fine.

Both unionized and union-free companies often fumble the ball by failing to place employees on notice of misconduct and its potential consequences. Thus, personnel policies should give clear examples of misconduct and plainly state that the misconduct may result in disciplinary action up to and including discharge. Be sure that every employee receives the handbook on his or her first day of work and signs the acknowledgment page. Employers should keep that page for their records, preferably in the employee's personnel file.

Be candid

Employers should always keep a written record of any employee misconduct and the resulting discipline. Brady was informed of his suspension by letter from NFL Executive Vice President (and former Buffalo Bills defensive back) Troy Vincent. The letter adopted the findings of the investigator's report and stated: "[T]here is substantial and credible evidence to conclude that you were at least generally aware of the actions of Patriots' employees involved in the deflation of footballs ... "

The court found this "generally aware" language to be nonsensical. "I am not sure I understand what in the world that means," the judge said. "[H]e didn't say that [Brady] knew, he said that ... [Brady] was at least generally aware." The investigator's report did not conclude that there was evidence that Brady participated in the misconduct, only that he was "generally aware" of the misconduct. The NFL, however, has no written policy that "general awareness" of others' misconduct is prohibited or could result in suspension.

There is no doubt that the NFL and its officials and investigators were convinced that Brady directed others to deflate footballs. But, this is not what they said.

When issuing discipline to employees, it is essential that employers state all grounds for discipline and document the case as fully as possible. Employers should communicate their objectives, expectations and standards, and the employee's failings, using clear and unambiguous language. And, as always, be honest and accurate; never sugar coat.

Be consistent

Another reason the federal court vacated Brady's suspension was because the NFL acted inconsistently with its past practice by investigating and suspending him.

The court found inconsistency in the NFL's investigation and suspension of Brady during a football tampering scandal. Indeed, this was the first time an investigation of football tampering included scrutiny of a player's actions. In 2009, an equipment staff member for the New York Jets was observed tampering with kicking balls.

The NFL investigated and suspended the equipment staff member, but did not investigate or suspend Jets kicker Jay Feely. In 2014, Minnesota Vikings and Carolina Panthers personnel were observed illegally attempting to heat footballs in frigid weather. The teams were investigated, but no players were investigated or suspended.

Likewise, the court found inconsistency in the NFL's suspension of Brady for failing to cooperate with the investigation. As the court observed, no player suspension imposed for obstructing an NFL investigation has ever been upheld. In 2010, Brett Favre was fined, but not suspended, for obstructing a sexual harassment investigation.

In 2012, former NFL Commissioner Paul Tagliabue vacated the suspensions of four New Orleans Saints players, finding "no evidence of a record of past suspensions based purely on obstructing a league investigation."

Always treat employees fairly and consistently. When issuing discipline to employees, prior decisions of the employer and the company should be reviewed. Employers should not impose the discipline they are considering if another employee with a worse record was treated more leniently.

The NFL lost because it failed to be fair or consistent in applying its own rules. The odds are that most companies have been or will be forced to defend against a discrimination or a retaliation claim, or otherwise will be made to defend employee discipline. When that happens, the employer will need to be able to demonstrate that the employee violated a clearly written policy, had notice of that policy, and received discipline consistent with the policy and the company's past practice. Luckily, you don't have to learn this the hard way as long as you pay attention to the NFL.

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